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WIFE *v.* HUSBAND IN THE COURTS

by

CLAUD MULLINS

Magistrate at South Western Police Court, London

with a preface by

SIR E. MARLAY SAMSON, K.B.E., K.C.

Stipendiary Magistrate of Swansea
Chairman of the Magistrates' Association

"*And now remains*
That we find out the cause of this effect,
Or rather say, the cause of this defect,
For this effect defective comes by cause."

HAMLET

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TO

THE EARL OF LISTOWEL

WHOSE SPEECH IN THE HOUSE OF LORDS

ON MAY 15, 1934

WHEN INTRODUCING THE

SUMMARY JURISDICTION (DOMESTIC PROCEDURE) BILL

(DRAFTED BY THE AUTHOR)

DIRECTED THE ATTENTION OF PUBLIC OPINION TO THE

URGENCY OF THE MATTERS DISCUSSED IN THIS BOOK

PREFACE

In view of the fact that Matrimonial Procedure in Courts of Summary Jurisdiction will come up for further consideration in Parliament when opportunity offers, it is very helpful to have existing conditions and suggested remedies reviewed by one who has made a special study of such matters.

Mr. Claud Mullins, in his capacity as a Metropolitan Police Magistrate, has had ample opportunities to appreciate the existing shortcomings of statutory procedure, and so far as may be legitimate, to put into practice essential remedies. He has been largely instrumental by a pen of much activity in focusing public attention on this particular problem and looks forward with confidence to an ultimate amendment of the law that shall do for wives and husbands the same service as has been done for juvenile and child offenders by recent Acts of Parliament.

This book should be read and thought over by every Justice who sits with any regularity because, whatever be his or her experience, fresh light is thrown by it on many problems that arise in the exercise of Matrimonial Jurisdiction in Courts of Summary Jurisdiction; whilst awaiting the report of the Home Office Committee, which now has under consideration the problem of social services in connection with Courts of Summary Jurisdiction, all concerned with these matters

that touch the intimate and daily life of the vast majority of people should be informing themselves as to remedies for the existing dissatisfaction in regard to Matrimonial Procedure in Police Courts.

Mr. Claud Mullins' book is therefore both timely and valuable because it gives a clear exposition of the existing legal practice, and makes very detailed suggestions for improvement therein.

Opinions will necessarily differ as to the suitability and practicability of many suggestions made, in particular because what may be admirably adapted to Police Courts in cities and large urban areas may be unsuitable and impracticable in rural areas. Mr. Claud Mullins stresses the fact that, in the development of conciliation methods, it is important that the Justice or Justices should be the mainspring of any such movement, and that all such efforts by Probation Officers and others should be subject to such control.

The problem as presented by him is a dual one, namely, how to keep an even balance and a definite distinction between conciliation and Court, where laws of evidence and strict procedure must necessarily prevail; much careful thought has been given to every detail of the problem examined, and I confidently recommend the study of this book to all who desire to be well informed on the subject. Constant pressure of informed public opinion is always necessary to secure legal reform; the sympathetic consideration which the Home Office is willing to give to progressive

legislation for reform in our Courts of Summary Jurisdiction needs to be fortified by constant expression of public opinion, and in seeking to stimulate this Mr. Claud Mullins' present volume will be of real service.

EDWARD MARLAY SAMSON

THE POLICE COURT
SWANSEA

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INTRODUCTION

THE work of our courts of law in dealing with disputes between husband and wife is of ever-growing importance. Not only is the dispute of vital consequence to the parties themselves, but their children also may be even permanently affected. The children are seldom seen by the court, and only too often it seems that they are not even present in the minds of the warring parents. But they and their future should always be present in the mind of the court. And apart from the effect on the immediate family, it is slowly becoming understood how deeply the community in general is concerned, and how widespread are the possible effects of parental discord in the home.

Under our English system two courts of law are concerned with this problem, the Divorce Court, which is part of the Probate, Divorce and Admiralty Division of the High Court, and Courts of Summary Jurisdiction, popularly, but unfortunately, known as Police Courts, and sometimes called Petty Sessions, a name that is equally unsuitable. This book is concerned with the matrimonial work of Police Courts, where for some sixty years efforts have been made in the larger courts, originally by religious societies alone, and latterly by them and the community in partnership, to supplement the legal framework with varying forms of social inquiry and assistance.

No similar endeavour has been made by or in the Divorce Court, but even there some enlightened thinkers are coming to realize that the law by itself cannot deal adequately with matrimonial breakdowns. While this small book was on the anvil a well-known practitioner in the Divorce Court, Mr. Thomas Bucknill, expressed in public his opinion that he "would like to see some scheme whereby a judge would inquire much more closely than was feasible as the law now stood into the real reason of the failure, and the future prospects of children, and would satisfy himself that all chance of reconciliation had come to an end."[1] One day I believe that the Divorce Court will include in its machinery, mainly for the use of the poorer sections of the community who have only recently been able in any large numbers to avail themselves of the court, some form of social investigation. I pointed out this need in April 1934,[2] and have long been convinced that the system of divorce evolved during the last century constitutes to-day a real menace to family life. Those who can afford ample professional assistance of all kinds may not need inquiry and help through the court, but it seems to me entirely wrong that, now that the same types of people who come to the Police Courts with their domestic difficulties are resorting in ever-increasing numbers to the Divorce Court, that court should be solely concerned with law (and a very inadequate law) and evidence. If those respon-

sible for the working of the Divorce Court would draw upon our experience in the Police Courts, or even work in co-operation with us, the whole question of divorce would quickly be seen in a different light —and possibly the conflict of opinion which has hitherto prevented reform would be considerably reduced.

It is not possible to deal further in this book with the reform of the Divorce Court. My object here is to describe the matrimonial work of Police Courts, to show where changes are desirable, and that a great number of valuable reforms can be carried out even without any change in the law.

Probably few of the women who come to Police Courts asking for Separation or Maintenance Orders realize at all what lies ahead of them if they get one. The present seems to them unbearable, and that is all that they are thinking of; the future with a regular allowance from their husbands seems an attractive prospect. But the future frequently turns out to be far from attractive if it depends upon the regular payment of such an order. No order, it always has to be remembered, that a Police Court can give permits either husband or wife to re-marry. If the husband is young, there is always the possibility that sooner or later he will embark on some other attachment, thus incurring obligations which in fact will disable him from paying the court order. This may be far from his intention at the time; many men are thoroughly

satiated with women and marriage by the time that they appear as defendants in court, and go cheerfully back to their mothers, or set up a bachelor life again with a feeling of relief. But life is long. Those who have to decide marriage cases should always have an eye to the distant future, although the law and the evidence concerns the past and present only. Very few men that we see in Police Courts will ever be in a position to maintain two women, to say nothing of two families; our economic system, like our morals, is based on monogamy. Day by day as I watch the women who come into court on summonses for arrears—probably the least attractive of all Police Court work—I sometimes wonder whether after all many of them would not have done better to put up with the ills they had rather than to have placed their faith in court orders. I often have similar thoughts about the husbands when they are before me having their pockets ignominiously searched. Was such an emancipation worth while? We in Police Courts must not refuse relief to those legally entitled to it, and we cannot force people to be wise about their own future. But in the true interest of the parties themselves, and in those of their children and the public, we can, and surely we ought to, see that before we make any final order we do all that is humanly possible by full, friendly, and frank investigation to avoid such an end to the proceedings.

A large proportion, in my experience the big

majority, of the broken and breaking marriages that the courts have to deal with are "forced marriages," where the choice of the father-to-be was to face either the parson or the Police Court; he "had to make a respectable woman of her," and "to give the baby a name." This kind of mock-chivalry, happily, makes less and less appeal to religious and social workers, but it is widespread among the people themselves. Parents usually try to force such marriages, frequently with disastrous results at an early stage. Yet even with a marriage that was contracted with such a motive its continuation is often the better course; by wise handling the child can yet be made the true link between its rash parents. These cases especially need most careful treatment.

From all points of view it is highly desirable that there should be a wise and intelligent handling of all matrimonial disputes. We are slowly realizing to-day that in the problems of the home lie the root of many of our social evils. We go on rescuing children here and improving Juvenile Courts there, we enthuse over what the Anglican Bishops at the Lambeth Conference of 1930 termed "moral ambulance" work,[3] but if, as surely we should, we want to prevent the indefinite repetition in the future of the social evils that beset us to-day, we must begin our research in the problems of the home.

Take, for instance, the disconcerting problem of

juvenile crime. The proportion of crime that is committed by those under twenty-one is one of the most disheartening problems of our time. It is all to the good that our Juvenile Courts are better than they were, even if they are not nearly as good as Parliament intended them to be. But while Juvenile Courts doubtless prevent much adult crime, they are poor instruments for preventing juvenile crime, much though we may hope from the new powers over children in need of "care or protection." Only too often are children damaged beyond repair long before they are taken to the Juvenile Court. The problem of juvenile delinquency must be tackled at the earliest stages in the home; potential criminals must be dealt with at birth—and indeed nine months before birth. As a modern American investigator has written in a book on *Criminology* (a very neglected science in this country), "wholesome family life is unquestionably an important factor in preventing the appearance of criminals."[4] Another modern American book, *One Thousand Juvenile Delinquents*, by Sheldon and Eleanor T. Glueck, points the same moral. It gives the results of a follow-up of a thousand cases that had passed through the Juvenile Court and the Child Guidance Clinic of Boston, Massachusetts. "The moral standards and conduct of the families from which our delinquents came were found to be very poor. Only one-tenth of the families gave evidence of good ideals, thrift, temperance, and moral decency.

. . . Parental relations were unfavourable to a healthy home environment, as there was separation or divorce or desertion in one-fifth of our families; in another sixth parental relations could be designated as only fair, as there was undue quarrelling among the parents, or indifference of one parent to the other, although there was no open breach."[5] This experience of American investigators is confirmed by that of Professor Cyril Burt, lately psychologist to the London County Council. In his book, *The Young Delinquent*, he shows that among his non-delinquent cases there were "defective family relationships" in 25·7 per cent, but that among his delinquent cases the figure was 57·9 per cent. "In one respect or another," Professor Burt wrote, "among what is by far the majority of my delinquent cases the child's domestic circumstances are demonstrably inimical."[6] There is also evidence from South Africa. In the *Handbook of Probation*, issued by the National Association of Probation Officers, London, it is reported that "in a survey of delinquents committed to a probation hostel in Johannesburg over a period of seven years it was found that no less than 75 per cent came from homes where the family relationships could rightly be classified as defective."[7]

Another grave problem that only too often has its roots in conflict between husband and wife is that of sexual offences. Every conscientious man or woman on the Bench must feel bewildered by such cases as

exhibitionism, especially when, as so frequently happens, the offender has a blameless record, and is apparently living a normal, happy married life. Whenever possible it is best to send such cases for psychological examination if a qualified and non-cranky medico-therapist can be found. When this is done, it is often found that the cause lies in maladjustment between husband and wife.

These are but two of the many respects in which the matrimonial work of our Police Courts has far-reaching consequences to the general community.

Obviously a Police Court cannot become a matrimonial clinic. Yet to admit this is to give no excuse to those who are content to conduct the matrimonial work of the court on traditional lines. Happily opinion is moving rapidly in this country, as in America, in favour of better, more humane, more scientific methods for dealing in and out of court with cases of matrimonial discord. On December 13, 1934, *The Times* gave prominence to a letter on the subject signed by Lord Horder, Dr. J. R. Rees (the Director of the Institute of Medical Psychology), Dr. William Moodie (the Director of the London Child Guidance Clinic), Dr. Edward Glover (the Chairman of the Advisory Committee of the Institute for the Scientific Treatment of Delinquency), and by Dr. J. A. Hadfield (Lecturer in Mental Hygiene at the University of

London). The following extracts from this letter deserve inclusion here:

> "Experience is teaching us more and more the importance of matrimonial discord, not only in the health and happiness of the parents, but in the well-being of the children. In a large proportion of 'difficult' children in our clinics their delinquencies and abnormalities of character and conduct are found to be due in part to conditions of disharmony between the parents.
>
> It is, therefore, with the utmost pleasure that we have observed the growing public interest in the methods of our Courts in handling matrimonial disputes in a way which seeks to remedy the causes. While there will always be a proportion of cases that have gone too far for investigation and reconciliation, experience shows that a large proportion of cases can be favourably influenced by such methods. To suggest that cases in the Divorce Court should be assisted by such methods may, under present conditions, appear chimerical. But it is not chimerical to plead for the adequate investigation of applications for separation and maintenance such as appear before Courts of summary jurisdiction. . . .
>
> Medical science gives ample and increasing evidence of the importance of sexual discord as a factor in matrimonial disputes.

> Work of this kind is already being done by probation officers and other social workers, dealing with such cases in private. . . .
>
> The need for full investigation will only be realized when upon the Courts themselves is placed a legal obligation to see that wherever possible an adequate investigation is made. At present our Courts are limited to the legal duty of deciding, according to strict laws of evidence, such questions as 'Has desertion been proved?' and 'Is there wilful neglect to maintain?' To few magistrates has it yet occurred that their duties are at present too restricted. So long as these conditions continue it is idle to hope for much reduction in the number of broken homes with all the consequent dangers to the children. Marriage problems are not solely matters of law. . . .
>
> More scientific handling of the factor of matrimonial discord would very considerably strengthen our attack on the kindred social problems of divorce and child delinquency."

Though this letter was signed by four experts in psycho-therapy, it is not necessary to assume that psychological investigation or treatment is required in the ordinary cases of matrimonial discord. To suggest this would be to go too far, and was not the intention of the writers. Their plea was rather for a

sympathetic, intelligent handling of these cases, and nobody knows better than psychologists what are the dangerous possibilities when such cases are dealt with in an automatic or purely legal manner. Though the letter pleads also that our courts should be under a legal obligation to investigate these cases thoroughly (a plea that I also would make), it is well to realize that there is nothing in the present law to prevent us from doing this in some measure as a voluntary duty to-day.

It should be stimulating to us to realize that matrimonial jurisdiction came to Police Courts in a most haphazard way. It came rather by accident than design—the typical English way. This being so, it is scarcely surprising that our methods for carrying out these duties have never been seriously examined, and that they are now thoroughly old-fashioned.

As the social conscience developed during the last century, and as life grew more complex, it became realized that neither the historic Poor Law nor the Ecclesiastical Courts provided adequate machinery for giving injured or deserted wives that measure of protection which improving human standards and the interests of children required. So in 1857 the Act of Parliament which for the first time provided State machinery for divorce and other matrimonial causes provided also a summary method whereby a wife could secure protection—for her property.

Section 21 of the Divorce and Matrimonial Causes Act, 1857, introduced unhappy married women to the Police Court, but limited relief to deserted wives who wanted an "order to protect any money or property she may acquire by her own lawful industry, and property which she may become possessed of after such desertion." Clearly not much relief was intended for the average wage-earner's wife. This provision fell into disuse when the Married Women's Property Act was passed. But experience of the new matrimonial work of the High Court soon established the fact that the masses of the people could not possibly have their troubles settled there, because of the expense and complexity of its procedure. (These features of the Divorce Court have not yet been generally removed, though the improvement made in recent years as regards "Poor Persons" divorces has been substantial.) In 1878 a summary remedy was introduced for a wife whose husband had been convicted of an "aggravated assault." By this Matrimonial Causes Act (section 4) a Police Court could on this ground make a Separation Order, and also direct that the husband should pay weekly sums to the wife for herself and any children under ten years of age, the custody of whom could be given to the mother. This was the small beginning of our modern system. In 1886 came a further Act, which gave a summary remedy to deserted wives, but only if the court was satisfied that the husband was "able wholly

or in part to maintain his wife or his wife and family," and "has wilfully refused or neglected to do so."[8]

In 1895 came a comprehensive scheme, and this Summary Jurisdiction (Married Women) Act is still the foundation of the matrimonial law which Police Courts administer. It is typical of the way in which Governments and Parliaments have handled, and I fear still handle, these matters that so vitally affect the homes of the people that this Act, like that of 1886, appears in a volume of statutes that is one of the thinnest ever bound; Parliament only deals with marriage when it has nothing of greater political importance to do. The Act of 1895 was not even a Government measure. It was introduced by Mr. E. W. Byrne, Q.C., member for Walthamstow, who was appointed a High Court judge two years later. When introducing the Bill he told the House that it had been "suggested by the chairman of the Essex Bench of magistrates, and its provisions had been read and approved by two metropolitan magistrates." The Bill had, however, a most distinguished parentage. It had been drafted under the supervision of Mr. Richard Webster, Q.C. (shortly to become Attorney-General and later Master of the Rolls and Lord Chief Justice Alverstone), Mr. Cozens Hardy, Q.C. (later Master of the Rolls and a peer), Mr. Bucknill, Q.C. (later a High Court judge), and Mr. Haldane, Q.C. (later Lord Chancellor). When on May 22, 1895, the Bill came up for second reading, it was not

debated in the House, and Mr. Byrne stated that the Home Secretary "did not object to the second reading of the Bill." The House referred the Bill to a Standing Committee, where several amendments were made, and on July 3rd the House passed it without any speeches. Then the Home Office became somewhat less lukewarm, for two days later the Lord Chancellor (Halsbury), who had just been appointed on a change of Government, bestirred the House of Lords, with the support of his predecessor (Herschell), to pass the Bill through all its stages in one day. No other peer spoke.[9] Thus was the real foundation of our people's matrimonial law laid. We of to-day would be grateful for even that measure of attention to the need for reform in the Police Courts.

This Act has been amended in several ways, and one amendment has been of the greatest importance. When I first came into contact with the marriage problems of the poorer sections of the community—in the capacity of a voluntary Poor Man's Lawyer in an East End Settlement—it was the law that applications for relief could not be made by a wife unless her husband's conduct "shall have caused her to leave and live separately and apart from him." This was a cruel law, for where was the wife to go, and from where could she obtain money to keep herself and her children pending a court order? But not until 1925 was this law altered. Again change in matrimonial law was due to private enterprise. The

Act of 1925 was, it is true, introduced by the Home Secretary as a Government measure, but its true legislative father was Lord Mamhead, who as Sir Robert Newman had introduced the Bill three times previously. The Government spokesman on the Second Reading of the Bill admitted that it was "a measure practically identical" with Sir Robert Newman's Bill, and that only the dissolution of 1924 had prevented that Bill, which had passed both Houses, from becoming law.

To-day we may say that the substantive law is in general satisfactory. Here and there minor improvements can be suggested, but it is now to administration rather than to substantive law that attention needs to be directed. For far too long have Police Courts been content to deal with marriage cases along orthodox lines, making no distinction between them and criminal prosecutions, or motoring or other administrative summonses. In the bigger courts the position has been considerably alleviated by the gradual coming since 1876 of Police Court Missionaries, but in the first place no missionaries can reform the methods of courts, however greatly they may assist; secondly, even to-day it is unusual except in the busy centres for missionaries to take part in the hearing of marriage cases.

Those who will pioneer in reforming our methods in hearing husband and wife cases can find encouragement in the thought that volunteer work is often the

best possible basis for later compulsory legal action. Within the present law we cannot do all that we would wish, but we can do a great deal, and that great deal will pave the way for progress later by Act of Parliament. This has been the experience in some States of America. We English are prone to sniff about American marriage laws because some States have divorce laws that do not appeal to us—as if our own were anything but a disgrace to us, both on account of the ease with which decrees are obtainable for adultery and of the denial of divorce on other grounds. In fact many American States are far ahead of us in their court methods for handling matrimonial disputes. In December 1933 an American judge wrote to tell me how the reforms which he originally adopted voluntarily were later incorporated into the law of his State:

> "Five years ago, when I was first assigned to the criminal court, I found these 'desertion and non-support' cases being tried along with all other criminal cases, and in the usual public manner. I somewhat arbitrarily proceeded to hear them in chambers informally. At the same time I saw the editors of all our local newspapers, explained the barbarity of the system to them, and enlisted their support in my effort to deal with the cases in a more civilized manner. The newspapers gave me whole-hearted co-operation.
>
> Subsequently our legislature made provision for the informal hearing of this type of case."

We in this country must not proceed "arbitrarily," however strong be our convictions, and cannot introduce reforms in court procedure that are contrary to law. But, as this book will show, this restriction by no means entirely ties our hands if we will use our heads and hearts.

At present the sole legal obligation resting on Police Courts in domestic, as in other, cases is to listen to such evidence on the legal issue as the laws of evidence permit, and then to decide the legal issue. A Justice in a busy court once said to me, "I am a referee in a dog fight." He was legally correct; our legal task is to watch the struggle, blow the whistle when necessary, and to decide which side has won. But at the same time there is no legal reason why we should only be referees. There is nothing in the law to prevent us from adopting different methods, and a different conception of our function, in husband and wife cases. There must always be certain similarities between such a case in court and a criminal prosecution or Shops Act summons, for the reason that some elementary principles of justice apply in all cases. But if we wish, we can alter a great deal and make a marked difference between a marriage case and an administrative summons.

I regard it as a mediaeval conception that husband and wife cases should be regarded solely as legal issues so far as the court is concerned. In many such cases there is no legal issue for the court to try; the

husband has admittedly deserted his wife, or has given her many black eyes. Is judgment to follow automatically when these facts are clear? Even in criminal work we are departing slowly from such a conception of a court's duty, and more and more we are remanding offenders for full inquiry out of court. If the parties to a marriage case refuse investigation, and this does happen, though it is rare, then of course the court must confine itself to its legal functions. But in the vast majority of cases a Police Court should postpone as long as possible its answer to such questions as "Has desertion been proved?" and devote itself, with the consent of the parties, to the preliminary problems, "What is the root cause of this trouble?", "Can it be put right?" and "Is it necessary to decide the legal issue at all?" None of these considerations apply in a criminal prosecution or motoring summons. The putting and answering of them in marriage cases is in no way prevented by the present law.

Those of us in this country who are travelling this road can profit by the experience of America. Thus in a report of a Joint Committee on Domestic Relations Courts published by the National Probation Association, New York, it is stated: "Present-day court machinery is too often adapted only to a contest between the parties. . . . In domestic problems the whole purpose of a proceeding is a readjustment of family matters that are out of gear. A contest by its

very nature intensifies the family trouble."[10] This is very relevant to our own problems.

It is sometimes said that attempts to investigate and reconcile a case cannot be made by a court which may in the end have to decide the purely legal issue. This point was made by several speakers in the House of Lords when proposals for reforming Police Court methods in marriage cases were first debated in that House (May 15, 1934). This argument is often but an excuse for not doing more than the legal duty. To advance it is to admit that it is right that the decision of the legal issue has to be given on only a partial disclosure of the facts. This is precisely what is happening to-day—and why for every person divorced in this country to-day there are four who are separated by Police Courts. Obviously the court cannot itself do all the detailed work of investigation, though it could do much more than is usual to-day. But somehow or other the court should see that it gets to know the general results of the investigation made on its behalf and be satisfied that such investigation has been sound. Before a court gives any final decision in a marriage case, it has a right to satisfy itself that such a final decision is necessary.

Another argument that is often used by those who seek to justify existing methods is that by the time that a marriage case reaches court matters have usually gone too far for reconciliation. This defeatist attitude is entirely contrary to my experience. Some

cases there always will be where this is true. But the big majority of cases yield to wise handling. Even where an investigator has made an informal inquiry without success, it sometimes happens that the parties will accept advice from the Bench. If the Bench is a good one, there should be no room for such a pessimist approach to these cases.

It is the purpose of this small book to discuss the organization of a Police Court in its matrimonial work, its methods of granting and hearing summonses, and the law which it administers, all with the object of indicating how best the courts can conduct this work. As Lord Merrivale said when introducing for the first time his Matrimonial Causes (Amended Procedure) Bill, "it is widely recognized that our apparatus is out of date."[11] And when he introduced the Bill for the second time (January 29, 1935) he said this:

> "These cases at present are brought before the magistrates' courts without any preparation on the part of the court, and with no notice of what is to come before them. They are mixed up with the ordinary criminal proceedings of the courts, and they are conducted in the same way as the criminal proceedings, although that is a thing which, by the publicity it gives and by the necessity which it causes for a public conflict between the parties, is about as mischievous as can well be conceived."[12]

All this is entirely true, but we need not wait for fresh legislation before we begin to put our house in order.

When expounding the law I have contented myself with general statements which, though not complete, show in outline what the law is. They will suffice to enable Justices, Probation Officers, and others to understand the legal position generally. But whenever any legal point is disputed the standard textbooks should be referred to. There are the omnipresent Stone's *Justices' Manual*, Lushington's *Summary Jurisdiction (Married Women) Acts*, and Lieck and Morrison's *Matrimonial and Family Jurisdiction of Justices*. Where necessary the relevant statutes and judicial decisions should also be consulted.

It should be the ambition of every Police Court, as indeed of every court of first instance, to avoid the necessity for appeals, for appeals have to be paid for by one of the parties, an awkward fact upon which our courts and lawyers are not prone to dwell. Many years ago an eminent City of London solicitor, Sir John Hollams, wrote: "My belief is that the great majority of litigants would be content with a patient hearing before a judge, and to abide by his decision. . . . I believe that the majority of suitors would prefer a system without appeal."[13] This is quite true, yet some appeals there must be, if only to prevent arbitrary conduct by courts. But Police Courts especially should

always bear in mind that their clients cannot afford, and do not want, appeals. Husbands and wives, however unreasonable between themselves, and however unreasonable in court, are sensible enough to have no interest in making the law of England, and when the law is made at their expense in the High Court, injustice has been done to some human being. When awkward legal questions arise, they can often be circumvented without any denial of rights; it is sometimes wise for a court to talk openly about the cost of an appeal to the High Court. But when a difficult legal point has to be faced, the greatest care is necessary, and an adjournment for consideration will probably prove a good investment. Appeals are always a hardship to somebody; sometimes they are a disaster, win or lose.

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WIFE *v.* HUSBAND IN THE COURTS

CHAPTER I

THE APPLICATION

AN application by a wife or husband is made, as are all applications for summonses, before "one or more" Justices. When such applications are being considered there is no question of "open court"; they can be heard in a private room. The Press representatives have no right to be present, though courts often permit them to be present, relying on their good faith not to report any part of the application proceedings.

A question that is sometimes difficult is whether applicants should approach the "one or more" Justices direct or through an intermediary. Practice as to this differs and must differ according to the frequency of court sittings and the number of applications. Where courts serve crowded areas, direct approach may result in congestion and may delay the day's work. On the other hand, to insist on direct approach in areas where courts only meet at intervals may be to delay the granting of relief. In both kinds of court, therefore, it is often the custom for applicants to be seen first by an intermediary, either the clerk of the court or his assistant, the Probation Officer, or the Police Warrant Officer. No general rules can be laid down. An inter-

mediary is often useful in summarizing the case for the Justices and in explaining generally the position to the applicant when her or his story shows no possibility of relief being available. But whoever be the intermediary, the golden rule should be that the applicant should always be informed that there is a right to approach the "one or more" Justices. The intermediary must not be a barrier to the court. The story is told—it is probably apocryphal—that at one court applicants were interviewed by a pious missionary who informed them that God intended husband and wife to live together and that they would get no summons. Even the most unreasonable applicant has a right to apply to the court, and only the court should refuse to issue a summons if the applicant desires to persist with the application.

There need be no formalities about the application. It is not essential that the party applying should apply in person, though, except where a solicitor is acting, this is desirable for the reason that the court has a discretion to exercise. In marriage cases this discretion is really valuable and should be exercised with great care. An applicant who shows a *prima facie* case is entitled to a summons, but the court must not act like an automatic machine. It frequently happens that the applicant's own story, especially where the parties are still living together, shows that an immediate summons is undesirable, even dangerous. Then a little delay for some preliminary investigation is usually in

the interests of both parties. The summons should not be regarded as a declaration of war, but at present it often is interpreted as such. Hence the wisdom in many cases of a little delay if the parties are still under the same roof.

The ideal is that every court shall have at hand someone who can carry out on its behalf a sympathetic investigation into marriage cases. I believe that this ideal will be realized before long. But pending reforms in the social services of Police Courts which need statutory sanction, most courts could do something in this direction. In busy courts in crowded areas there is ordinarily a Probation Officer or Court Missionary in regular attendance, and then he or she is the obvious person to do this work. But in medium and small courts Probation Officers usually have several courts to attend on and cannot always be present in matrimonial cases; often they are solely concerned with offenders placed on probation. Clerks of courts cannot be expected to conduct inquiries of a social nature; as the number of whole-time clerks increases, as I believe it will increase, they will not ordinarily be local men, so will not always be available even to receive applicants for summonses. In few areas, however, would it be difficult for the court to find some public-spirited and social-minded person willing to assist in cases of matrimonial discord. Perhaps a local clergyman, if he is broad-minded, would be suitable and willing, if asked; perhaps his wife or a local teacher. Failing

this, there would probably be some sensible person in the district who would be ready to help in this way. One of the Justices could act in this capacity, provided that he or she did not act in court in any case that had been personally investigated. What is needed is someone at hand who is willing to see the applicant, and wherever possible the husband or wife of the applicant, and to endeavour to find out, without being in any way a barrier against the court, whether it really is desirable for a summons to be issued, or, if the summons has been issued, whether in the interests of the family it is wise for the case to be heard in court. Such an intermediary must never put pressure on the parties, but short of this a preliminary and sympathetic talk very often results in smoothing over the difficulties and in avoiding court proceedings to the lasting benefit of the home. The field open to the investigator will be discussed more fully in Chapter v.

Experience has taught me that in a busy court it is best that all applicants, except those with purely trivial complaints, should see the magistrate. At the opening of the court each day I dispose of formal applications first, such as those by public authorities; then I go near to the witness-box and have at my side the Probation Officers of both sexes. I extract the barest outline of the applicant's trouble, and then and there decide upon one of three courses, for I find that the cases fall naturally into three groups. In the bad cases, which include all those where the husband appears

finally to have left his wife, I authorize a summons at once. At the other end of the scale are the cases, usually where the parties are living together, where a climax does not really appear to have been reached; these cases I refer for preliminary investigation (as will be explained later) unless the applicant presses for an immediate summons. The third group consists of the more difficult cases where it is not obvious what course should be taken. These I refer to one of the Probation Officers for report during the day, giving them power to issue, but not to refuse, a summons.

Where a Probation Officer or other investigator is available, a very useful plan is to ask him or her, in cases where summonses have been authorized, to write to the defendant to suggest a preliminary talk before the case is heard in court. When I introduced this system at my present court the results proved to be excellent. The letter used reads as follows and is manifolded:

SOUTH WESTERN POLICE COURT,
LAVENDER HILL, S.W.11.

Private and Confidential.

.....19.....

Dear Mr.

Your wife has come to this Court and I am sorry to learn that there is unhappiness between you and her.

The Magistrate has decided that it is best to

issue a summons for ....
and this will be served on you in the ordinary way.

The case is to be heard on .....
at ..... at which time you should be present in Court.

It will probably help you both if you had a personal talk with me before the case comes on. With the approval of the Magistrate, therefore, I write to tell you that I shall be pleased to see what I can do to help if you will call and see me at your earliest convenience.

I can arrange an appointment at a time to fit in with your hours of work.

Yours sincerely,

Probation Officer.

Our experience has been that in most cases the husband is glad to avail himself of this invitation. This has most beneficial results. The husband sees at once that there is someone at the court who is prepared to help in a purely friendly way, and this fact alone often removes any feeling of bitterness. By the time that the case appears in the court's list it is no unusual thing to find that the parties no longer desire to appear. The Probation Officer is authorized to tell the parties that they need not appear if they do not wish. On an average about one-third of the cases in my weekly

domestic list make no appearance in court. If the parties appear, the court has in the Probation Officer some impartial person of whom the question can be asked before the case opens, "Is it desirable to hear this case?" Quite often the Probation Officer is able to stand up and say, "If the court would allow me a fortnight, I may possibly be able to do something." When this happens, I turn to the parties and ask whether they are content with this suggestion. Unless both agree, the case proceeds, but more often they agree to this short delay. I then ask whether any Interim Order is necessary, inquire into this, and act accordingly.

Where the parties have not seen the intermediary, or where only one of the parties has been seen, quite a useful plan is to invite them both up to the Bench for a few informal and preliminary words on the same lines, the object being to find out whether a public hearing is necessary. A court should always realize that very often the first few statements, reported as they may be in the local Press, will suffice to render reconciliation impossible.

Courts that endeavour thus to deal with as many cases as possible without any public hearing will find that thereby their own task becomes in many ways less interesting and more depressing; the cases that remain to be heard will be those which from the human point of view are the most hopeless. The most interesting cases are those which yield to wise handling,

but until the law enables us to work in court with some measure of protection from the full glare of publicity, we must be content if the hopeful cases exclude themselves from our lists. For thereby we are doing the maximum good under present conditions. Even where cases make no formal appearance in court, the court has not necessarily been idle. I am in almost daily informal consultation with the Probation Officers in regard to the cases that they have before them. Courts should in my opinion never accept the idea that courts are concerned solely with the legal issue and that social investigation concerns only Probation Officers or other workers. This idea is all too prevalent today. It will be found, as I think the Probation Officers who work with me have found, that the social workers have all the more scope if this work is generally supervised and supported by the court.

At application time an important fact to be remembered is that by a wise provision of the law Police Courts have power to remit the fee due on the issue of a summons. In poor districts many women come who are really destitute, and even the fee of two shillings can be a barrier. This power should be used unhesitatingly in such cases, even when the applicant does not ask for this relief.

CHAPTER II

THE COURT

THE law at present places no restriction upon the number of Justices who may compose a court when husband and wife cases are being heard and does not prescribe any qualifications for this work. To do the latter would be difficult, if not impossible, for there are some things that cannot be put into writing. Yet obviously there are certain general principles which should be voluntarily adopted, even if they cannot be prescribed by law. For instance, one woman Justice at least, preferably a married woman of medium age, should always be a member of the court. If there is no such woman Justice available, the local Advisory Committee for the selection of Justices should be informed. Again, every effort should be made to include in the court young Justices of both sexes, preferably those who are married and whose marriage was not too long ago. Age is no disqualification for this work—within reason. But the average age of the court should not be unduly high, and there should always be some members who have reason to resent the description middle-aged.

An essential qualification for matrimonial work is freedom in all members of the court from any false modesty. We English people are very reserved about

our intimate lives, and most of us think that on the whole this is a virtue. But when marriage breakdowns are being dealt with, those responsible for decisions must be prepared to face realities. The underlying cause of breakdown is often of a sexual nature, and while under present conditions it is rare for such matters to be brought up in court, none the less the court must have this possibility before it; otherwise much will remain inexplicable. The court must spot the cases where sexual difficulties lie at the root of the trouble, and should then refer them wherever possible for investigation. In most cases sexual discord is only relevant to explain conduct and does not form a direct issue. The latter may be a blow, yet the real question may be whether the parties have given each other a square deal in their sexual life. In such cases sex is better dealt with out of court. But even under existing conditions sexual issues have sometimes to be dealt with formally in court, for instance when a man pleads justification for his conduct on the ground of his wife's refusal of "conjugal rights." A Justice, therefore, who has any inhibition about matters of sex had better devote his or her attention to motoring summonses and avoid marriage cases. On the other hand, should any Justice be at the opposite extreme and find a sadistic pleasure in hearing about the sexual experiences of other people, or should a Justice be of the school that finds sex at the base of every human action, then also such Justice had better stay away from husband

and wife cases. The great need is to have Justices who are open-minded, sympathetic, and free from bias, moral or otherwise. This applies to all judicial work, but in particular in the hearing of matrimonial disputes.

As to numbers, every Bench should agree voluntarily upon a self-denying ordinance. Before long I believe that the law will insist upon a small court for domestic work, as has been the case for many years in Juvenile Courts. By the Juvenile Courts (Constitution) Rules, 1933, not more than three Justices, among whom "so far as practicable" shall be one woman, may form a Juvenile Court, and Benches would do well to accept this principle for matrimonial work. It seems to me fundamentally wrong that a dispute between husband and wife should be heard before a court that has more than five members. There are drawbacks in having an arbitrary system of panels, as is required for the Juvenile Courts.[1] It may be possible to select Justices "specially qualified for dealing with juvenile cases," though it can scarcely be said that our efforts to achieve this have been wholly successful. But, as I have said above, it is impracticable to lay down formal rules as to which Justices are specially qualified for marriage cases. Every Bench should agree that not more than five should form the court at any one time, and should so far as the number of marriage cases demands allocate the sittings among themselves according to their suitability for this work.

When there is a stipendiary magistrate, lay magistrates, except in London, are entitled to sit on the Bench with him and to vote on an equality. There is a Home Office ruling to this effect, based on an opinion of the Law Officers of the Crown, and it is a wise policy.

Courts which have many marriage summonses to deal with do well to set apart definite times for hearing them, subject always to the convenience of the parties. Courts where marriage cases are few are well advised to fix them for definite hours. For far too long has it been the custom in most courts to make no distinction between a marriage summons and one for a motoring offence or a breach of the Food and Drugs Act, or even a criminal prosecution, and to hear them all in one long list. Yet, as explained in its Memorandum, one of the objects of the Byrne Bill which became the Act of 1895 was to keep distinct the administration of civil and criminal remedies. The drawbacks of not separating matrimonial from other work are obvious. It surely offends our sense of decency that an unhappy husband and wife should be summoned to a court that will probably be crowded with police officers concerned in traffic summonses, shopkeepers summoned for breaches of the Shops Act, and so on. As Chapter IV will show, a marriage case requires quite a different technique from a criminal prosecution or an ordinary summons, and this is not likely to be achieved if all are in one list. Many courts have a

practice of putting matrimonial cases at the end of the summons list, and probably this is the best course where the cases are few. Such a practice has the advantage that the court is comparatively clear when the marriage case is heard. But it has two big disadvantages. The parties may have sat waiting a long time, and when their turn comes they feel that they are going to be dealt with like those who have sold cigarettes after the appointed time. What is more important, the parties always get a tired court; few jobs are more tiring than dealing with a long list of miscellaneous summonses. Some years ago a metropolitan magistrate of great experience pointed out the drawbacks of this practice in busy courts. In his book *The Life of a London Beak*, the late Mr. H. L. Cancellor wrote: "Then at the end of a long day's work the tired man on the Bench listens to the story of domestic differences between husband and wife. On his decision depends the future happiness of two young people who are on the threshold of married life."[2] But courts are very slow to adopt even the suggestions of those whose lives have been spent in them. To show how little matters have changed since Mr. Cancellor wrote, I would quote the following from my own book, *Marriage, Children and God*, which was published in 1933:

> "I once sat at a London Police Court and the following constituted my afternoon's work: 6 trivial summonses for playing football in the street,

> 2 for gaming, 3 for street obstruction, 5 for excessive speed, 2 against motorists for not being insured, 1 against a motorist for driving carelessly, 4 for offences in regard to insurance stamps, 4 for obstruction with costers' barrows, 1 assault case; and then, when about two hours had elapsed, I turned to a summons against a husband by his wife for neglecting to maintain her, one by a wife for her husband's persistent cruelty and 4 summonses by wives for arrears on maintenance orders, each of the latter involving the issue of the husband's imprisonment. At the opening of the court I counted 19 police officers in uniform, all there in connection with the first part of the afternoon's work. I find it impossible to believe that this is the best that our Police Courts can do."[3]

Where marriage cases have to be taken as part of the general list, at least they should be summoned to the court for a stated time.

These are matters which Justices can put right of their own volition, and happily increasing numbers of courts are doing so. As soon as circumstances made it possible I instituted marriage afternoons at the South Western Court, London. I sit one day every week at two o'clock for marriage cases only, and unless the parties genuinely cannot come then, these cases are never in the lists for the other days. Experience has proved that this is the beginning of many valuable

improvements, and it appears to be popular with all concerned.

Another matter that is of considerably more importance than is apparent at first sight is that all cases of common assault, threats, etc., between husband and wife should be regarded as matrimonial, not criminal, issues and be heard among the marriage cases, being thoroughly investigated on behalf of the court. At present these cases are usually regarded in the same way as similar cases arising between strangers. In many courts the husband-defendants are persuaded to agree to be bound over to keep the peace without any evidence being heard, a practice that I refuse to permit because I believe that when married couples get to this condition, full inquiry is essential. It seems to me to matter comparatively little whether the alleged blow was struck or not. The true questions are, "What made the husband strike?" or "Why does the wife say she was struck?" From the strictly legal point of view these questions are irrelevant, and in fact they are usually ignored. An assault summons between husband and wife is the golden opportunity of the Probation Officer or other social worker to try to prevent domestic sores from festering. It is true that a summons for assault can result in imprisonment, but I have never known imprisonment be awarded in husband and wife assault cases; the serious cases are usually handled by the police after formal charge for inflicting grievous bodily harm. In my courts, thanks to the labours of

Probation Officers, many couples who appeared on assault summonses have been reconciled, just because the summons led to a full and friendly inquiry. Many Justices must have had similar experiences. All could have.

Only in the hearing of summonses under the Guardianship of Infants Acts have Justices power to exclude Press reporters.[4] Such summonses can be, and should be, heard in a private room. With this exception there is a general right in the Press to report Police Court proceedings. Some limitation will, I believe, come before long on the lines of the Acts of 1926 and 1935 which regulate the reporting of cases in the Divorce Court.[5] I cannot see that it is right that persons seeking divorce or nullity (under circumstances where there is far less prospect of reconciliation) should be protected from the full glare of publicity and yet applicants for separation and maintenance, a considerable proportion of whom come together again, should have no such protection. Reporting in these cases does infinitely more harm in the Police Court than it ever could in the Divorce Court, because of the local papers which often give so much space to these events. Complete privacy would in my opinion be bad, as there would be then no check upon the conduct of the court. But I consider it to be thoroughly undesirable from all points of view that cases that are adjourned for further investigation and efforts at reconciliation should be reported. By such reporting

the prospects of reconciliation are heavily reduced. But at present all that the court can do is to have the maximum inquiry made before a public hearing, so that as many cases as possible are settled without such hearing and, as to the rest, to make an occasional appeal to the gentlemen of the Press not to report any particular case where the results would be specially harmful. Such an appeal, if not made too frequently, is sometimes effective. Some local newspapers resent all efforts to check their activities and make much use of their undoubted right to criticize the Bench when such efforts are made. My own efforts in this direction resulted in an editorial protest in one local paper. "The local Press exists to give publicity to matters of interest and to broadcast local information. It is in the public interest that the widest publicity should be given to Police Court proceedings. Without such publicity we should be in danger of reverting to conditions which prevailed when the Star Chamber was in being," and so on; as if there were no difference between reporting a murder case and a dispute between husband and wife which is ultimately settled by mutual agreement. Benches should not in the slightest degree be deterred by such fulminations, provided that they are acting within the law. The Press generally has shown much sympathy for the demand for the more human and more intelligent hearing of marriage cases in Police Courts and, I believe, will loyally accept reasonable restriction when these are imposed. At

present, however, Benches must not attempt more than is legally permitted.

When hearing marriage cases (as distinct from applications for summonses) Justices sit in "open court," and everybody has a right to attend the court in so far as there is room. Personally I believe that here also changes will be made before long, for public opinion is coming to realize that the presence of idle sightseers and neighbours hampers the best efforts of the court. I do not believe in the complete exclusion of the public, but the law applicable to Juvenile Courts[6] could easily be applied to the matrimonial work of Police Courts with some modifications. Until this happens, we have to do the best we can. Where a Bench has two public courts in the same building, there is nothing to prevent marriage cases being heard in the smaller of the two. This solves the problem in a typically English way; the general public has a right to attend, but in fact there is only room for a very few, and the rest can be told politely but firmly, but also legally, that they must wait until there is room. This is my practice at the South Western Court. I sit for marriage cases in a small court often used for the ordinary work when there is pressure and two courts are necessary on the same day. In this smaller court there is only one small bench for the general public, and no dock. So long as the public have free access to this bench (often it is occupied by the parties in cases that are to follow, and sometimes, I am glad to say,

by local clergy), the law is satisfied. The big court is left empty and is used as an additional waiting-room for the parties. Thus we in fact exclude the sightseer and the neighbour. It is the latter who does the most harm. In the debate in the House of Lords on January 29, 1935, when Lord Merrivale's Bill was introduced for the second time, Dr. Pollock, the Bishop of Norwich, used these very human and true words:

> "I am often struck, in my dealings with the lives of those who live in humble homes, with the contrast which often exists in their attitudes to one another. When they are in great affliction, when they are very poor, when some sorrow or some sickness has come, their goodness to one another is almost unbelievable. On the other hand, when there is some little unpleasant or nasty gossip, then with a wasp-like vigilance they are ready to repeat it and to make the most of it, and that is just the thing which is most likely to spoil any opportunity of reconciliation."[7]

All of us who are in any way in touch with social problems know how true these words are. We ought, therefore, to do all we can within the law to prevent gossiping neighbours from satisfying their curiosity Where Justices have the facility of a small court, they should unblushingly use it.

REFERENCES

1. Children and Young Persons Act, 1933, Second Schedule, and Juvenile Courts (Constitution) Rules, 1933.
2. *The Life of a London Beak*, by H. L. Cancellor (Hurst and Blackett), p. 220.
3. *Marriage, Children and God*, by Claud Mullins, with a preface by the Bishop of Southwark (Allen and Unwin), p. 196.
4. Guardianship of Infants (Summary Jurisdiction) Rules, 1925.
5. Judicial Proceedings (Regulation of Reports) Act, 1926, and Supreme Court of Judicature (Amendment) Act, 1935, section 4.
6. Children and Young Persons Act, 1933, section 47.
7. Hansard, Lords, January 29, 1935, p. 739.

CHAPTER III

THE LAW

THE warning given in the Introduction must be remembered throughout this chapter. I am not writing a complete guide to the domestic law of Police Courts, but am giving such an outline as will enable those concerned to understand the kind of problems that arise. Textbooks must be referred to when decisions on legal points have to be given. But a further warning is desirable. English law is a jumble of statutes and judicial rulings. The latter merely represent such points as may by chance have been submitted to the higher courts. For a great deal of what Police Courts have to decide there is no judicial precedent, either because the point is too obvious to be litigated on appeal or because, though difficult, nobody has yet been able or willing to spend the necessary money on legal fees. Justices would do well also to bear in mind that only the exceptional case goes from the Police Court to the High Court; therefore a decision of the High Court should always be read in the light of the facts on which it was given.

Very little relief can be given by a Police Court to a husband. In four years' work in busy courts I cannot remember ever making an order on a husband's summons under the marriage Acts. The reason for this

apparent discrimination against husbands is twofold. In the first place it is usually open to him to adopt what in politics is called Direct Action. Having ordinarily the power to maintain himself, he can leave his wife. By so doing he leaves it to his wife to proceed against him, and if she does so he can justify his conduct, as will be explained later. Again, if he feels that his children should be with him, he can usually take them by peaceful means; if this is not possible, he can apply to the court under the Guardianship Acts for the legal custody of them. (A real injustice to husbands was involved in the law as it was enacted in 1886 and 1925, for such a step could only be taken "on the application of the mother." This injustice was removed in 1928.)

In the second place the paucity of relief for husbands has to be considered in the light of their legal obligation to maintain their wives and children. We men marry "for better, for worse," and if we make a bad bargain we are seldom allowed to wash our hands of our responsibilities. In the next chapter some warning will be given about allowing some wives whose conduct has been entirely unreasonable, though falling short of a legal justification of the husband's conduct, to become life pensioners upon their husbands, especially where there are no children to maintain. But none the less, in the words of Lord Merrivale in the case of Dewe *v.* Dewe (1928),[1] "the right of a wife to maintenance as against her husband is not contractual in its

nature. It is an incident under the Common Law of the status or estate of matrimony." The learned President cited some very ancient law in support of this sound proposition.

The Poor Law liability of the husband lies behind the matrimonial work of a Police Court. Under section 14 of the Poor Law Act of 1930 (which in this matter consolidated the historic law) "it shall be the duty of the father . . . husband . . . of a poor . . . or impotent person, or other poor person not able to work, if possessed of sufficient means, to relieve and maintain that person." Short of proving adultery by the wife for which he cannot reasonably be held responsible, it is very difficult for a husband under the Poor Law to rid himself of his responsibilities by criticizing the conduct of the wife, and, as all Justices know, the hoary old Vagrancy Acts are in force to bring to book husbands who leave their families on the rates. Police Courts need not accept Poor Law standards, for there are legal differences between a husband defending himself against a matrimonial summons by his wife and one faced with proceedings by a Public Assistance authority. But the existence of the Poor Law liabilities should not be forgotten.

So rare in fact are orders in favour of husbands that it is only necessary here to set out the bare legal grounds upon which such applications can be made. There are two grounds upon which a husband may apply for a matrimonial summons. The first is where

the wife is alleged to be a "habitual drunkard" as defined by the Habitual Drunkards Act, 1879. (A habitual drug-taker is now included.) The tests applied by this definition are severe and in practice are difficult to satisfy. But even when this obstacle is overcome, the court "may" (and this comes very near to "must") make not only a separation order but also an order that the husband shall maintain his wife and pay the costs of the application. This being so, it is scarcely surprising that there are but few of these cases. Secondly, a husband may apply on the ground that his wife has been guilty of persistent cruelty to his children. The law here is badly drafted, and it is not settled whether in this case also a Police Court may order that the husband shall maintain his wife. The learned editor of the current edition (1933) of the standard textbook, *Lush on Husband and Wife*, believes that it can and that generally the conditions that apply to an application on the ground of habitual drunkenness are relevant.

Before dealing with the law as to applications by wives one further warning is desirable. In 1934 the High Court decided (Higgs *v.* Higgs, No. 2)[2] that where a matrimonial cause is pending in the High Court, a Police Court should not entertain any application for maintenance. I cannot help regarding this decision as an unfortunate one, since the High Court is not equipped with machinery for dealing with the

money affairs of humble people that is local, speedy, and cheap. But this is the law, so Justices must, however regretfully, refer the parties in such cases to the High Court. Until a petition has been lodged in the High Court, however, the Police Court has jurisdiction, even if the parties have applied to the Poor Persons' Department.

There are many grounds upon which a wife can apply to a Police Court for relief, but in practice only three are frequent. One of the advantages in not writing a legal textbook is that I need devote no space to the many occasions where legally relief can be sought, but which very seldom happen. In the most used legal textbook on the subject two chapters are devoted to a wife's remedy when her "husband shall have been convicted summarily of an aggravated assault upon her" or "convicted upon indictment of an assault. . . ." I have only had one case of the former and have never had the latter. When such cases arise, the textbooks should be consulted. For my bird's-eye view of the law I can concentrate upon the three ordinary grounds. These are (1) desertion, (2) wilful neglect to maintain, and (3) persistent cruelty.

DESERTION

Though the word desertion has several legal meanings according to the circumstances, the question what

constitutes desertion in Police Court marriage cases does not ordinarily give any serious difficulty. The question whether a husband could or does maintain his wife or children is now irrelevant to the issue of desertion. Practical difficulties sometimes arise when the parties are still living under the same roof, when conditions of work make it impossible for the parties to live by day and night in the same place, and when the husband asserts that his wife ordered him out of the house. Occasionally a difficult legal situation arises where the parties have been living with parents and the husband finds the position so impossible that he leaves. The textbooks help on these occasions, but common sense helps more. The key rules are that desertion must be wilful on the part of the husband and be without reasonable cause, and that it must be against the will of the wife. This latter point is important, for if the court is satisfied that the wife-complainant was glad to see her husband go, and freely consented to his going, then a desertion summons must be dismissed, though one for wilful neglect to maintain may sometimes follow quickly. As Mr. Justice Shearman said in the case of Roe *v.* Roe (1916),[3] "the general principle underlying these cases is that desertion must commence by a separation brought about by one party against the consent of the other party and that if they separated by consent, there cannot be desertion." It is well to bear in mind that desertion is a continuous act, so a wife may take action

even after many years, though she would have to explain the delay satisfactorily. Where it seems doubtful whether the wife agreed to her husband's departure or not and the husband is not maintaining his family, it is often wise to issue at the same time a summons for desertion and one for wilful neglect to maintain.

"Constructive desertion" is a phrase that is often used. It exists where the wife has left the husband, and justifies her action because of her husband's conduct. Here the issues are somewhat the same as in a summons for persistent cruelty, and the position will be dealt with more fully under that head. On the whole it is easier for a wife to justify her leaving her husband than to obtain an order for persistent cruelty. Thus a wife is not held obliged to live with her husband if he is carrying on an adulterous intercourse with another woman, either in the home or outside it, and refuses to give it up, but this would not ordinarily constitute persistent cruelty. It has been held, however, that if the parties originally separated finally by mutual consent, subsequent adultery by the husband does not constitute desertion.

The law wisely insists upon a rigorous standard before it allows either a wife to justify leaving her husband or the reverse. The formal proof of a matrimonial offence used to be insisted upon, but after 1884 this was modified. But the standard is still severe. Thus it has been held that frailty of temper, distasteful habits, conviction for a criminal offence that does not

constitutes desertion in Police Court marriage cases does not ordinarily give any serious difficulty. The question whether a husband could or does maintain his wife or children is now irrelevant to the issue of desertion. Practical difficulties sometimes arise when the parties are still living under the same roof, when conditions of work make it impossible for the parties to live by day and night in the same place, and when the husband asserts that his wife ordered him out of the house. Occasionally a difficult legal situation arises where the parties have been living with parents and the husband finds the position so impossible that he leaves. The textbooks help on these occasions, but common sense helps more. The key rules are that desertion must be wilful on the part of the husband and be without reasonable cause, and that it must be against the will of the wife. This latter point is important, for if the court is satisfied that the wife-complainant was glad to see her husband go, and freely consented to his going, then a desertion summons must be dismissed, though one for wilful neglect to maintain may sometimes follow quickly. As Mr. Justice Shearman said in the case of Roe *v.* Roe (1916),[3] "the general principle underlying these cases is that desertion must commence by a separation brought about by one party against the consent of the other party and that if they separated by consent, there cannot be desertion." It is well to bear in mind that desertion is a continuous act, so a wife may take action

even after many years, though she would have to explain the delay satisfactorily. Where it seems doubtful whether the wife agreed to her husband's departure or not and the husband is not maintaining his family, it is often wise to issue at the same time a summons for desertion and one for wilful neglect to maintain.

"Constructive desertion" is a phrase that is often used. It exists where the wife has left the husband, and justifies her action because of her husband's conduct. Here the issues are somewhat the same as in a summons for persistent cruelty, and the position will be dealt with more fully under that head. On the whole it is easier for a wife to justify her leaving her husband than to obtain an order for persistent cruelty. Thus a wife is not held obliged to live with her husband if he is carrying on an adulterous intercourse with another woman, either in the home or outside it, and refuses to give it up, but this would not ordinarily constitute persistent cruelty. It has been held, however, that if the parties originally separated finally by mutual consent, subsequent adultery by the husband does not constitute desertion.

The law wisely insists upon a rigorous standard before it allows either a wife to justify leaving her husband or the reverse. The formal proof of a matrimonial offence used to be insisted upon, but after 1884 this was modified. But the standard is still severe. Thus it has been held that frailty of temper, distasteful habits, conviction for a criminal offence that does not

in itself constitute marital cruelty, addiction to drink falling short of either habitual drunkenness or persistent cruelty, and so on, do not justify separation. The law enforces the fact that both parties, having married for better and for worse, may have a good deal to put up with. The best test is that laid down by Lord Gorell in the well-known case of Oldroyd *v.* Oldroyd in 1896,[4] where he used these words: "it has become practically impossible for the spouses to live properly together." These words were accepted by Mr. Justice Shearman in the later case of Greene *v.* Greene (1916).[5] The standard used to be even more severe. Thus in the case of Evans *v.* Evans in 1790[6] Lord Stowell said that "the causes must be grave and weighty, and such as show an absolute impossibility that the duties of the married life can be discharged." This case is often quoted and is well worth reading, but it assumes a standard that is not now fully enforced. "Grave and weighty" the causes must still be, but the difference between absolute impossibility and practical impossibility is just the difference between 1790 and to-day.

A warning may perhaps be given here for laymen only. The law does not, and cannot, object to married people leaving each other or going to live with someone else. All that the law can do is to enforce certain consequences in proper cases. Police Courts, therefore, must not ask themselves, when they are faced with the final decision, whether husband and wife should be still living together, but rather whether the con-

ditions set out by law have been fulfilled which require that one party should be ordered to pay money to the other.

The issue whether a parting was justified is frequently raised, both in a summons by the wife for desertion and by the husband in defence to a summons for desertion or wilful neglect to maintain. In the latter case the husband has a very difficult task, for, as explained above, it is by no means easy for a husband to get rid of his marital responsibilities. Sometimes a husband defends himself on the ground that his wife has committed adultery, and section 6 of the Act of 1895 provides specially for this. If established, this defence is a complete answer both to a summons for desertion and to one for wilful neglect to maintain. But the statute requires that "the husband has not condoned, or connived at, or by his wilful neglect or misconduct conduced to such act of adultery." A considerable proportion of such defences by the husband fail here. The double standard of morality is still found extensively among parties to marriage summonses, and courts have often to remind husbands that their complaints about their wives' conduct do not avail them as their own conduct was the cause. Another point to be remembered is that where adultery is in issue, courts should (not must) require some corroboration of the story. This difficult question of corroboration will be dealt with more fully later.

Another defence that is sometimes raised by a

husband is that his wife "would not be a wife to him." This defence also appears in both desertion and wilful neglect to maintain cases. Ordinarily the marriage relationship implies reasonable sexual intercourse, and both parties have rights here, both positive and negative, though a study of the reported decisions of the courts might give the impression that only men have these rights. But as I have said above, there is much good law that is not to be found in legal decisions, just because the point has not come up for decision by a higher court. On one side of the law the case of Synge *v.* Synge (1901)[7] is the standard authority. The marriage was in 1884, but in 1891 the wife, who had embarked upon a professional career, wanted her husband to promise in writing "that when we are living together under the same roof we shall only nominally be living together as man and wife." The husband did not sign, apparently accepted the situation for a few months, and then returned to his work abroad. On his return he refused to accept his wife's conditions and, as the wife persisted, the parties never lived together again. The President (Lord St. Helier) held that the husband had not deserted his wife and that, if he had, there was reasonable cause for his doing so. This decision was confirmed by the Court of Appeal. But in Police Courts the reverse situation sometimes arises, namely where the husband makes excessive sexual demands upon his wife. Here reported decisions help little, and Justices must do their best

to apply normal common-sense standards, bearing in mind that both sides to a marriage have duties and rights in sex as in other matters.

The husband's defences that are most frequently met with in desertion cases are (1) that the wife told him to go, and (2) that he is willing to live with his wife. The first seldom succeeds, and requires close examination. Even if the wife has said "Get out," a husband is not entitled to take her at her mere word, for such things are easily said in a fit of temper, and it often turns out that this is the first time that the husband has ever obeyed his wife. The whole conduct of the parties must be investigated when such an issue is raised, and the court must satisfy itself that the wife has really consented to the husband's going.

The second defence is more difficult. Parties often say that they are willing to return if the other side will do so-and-so or will refrain from doing so-and-so. Such statements are sometimes impracticable or unreasonable, for fundamental changes in human nature are rare, especially after a public hearing in a Police Court. Sometimes this defence is put forward for court purposes only. In every case it must be analysed with great care. The court must be convinced that the offer to return is bona fide and is entitled to examine it in the light of the past behaviour of the parties. The conduct before and at desertion "was not necessarily wiped out by a letter of invitation to the wife to return," said the High Court in the case of Thomas *v.*

Thomas in 1924.[8] But at the same time it must be remembered that these offers to resume married life are sometimes genuine; distance sometimes lends enchantment to the vision of a wife. When this is so, courts do well to do what they can to fan the spark of hope into a prospect of a real reconciliation. It is seldom wise to assume that faults lie only on one side, and especially in desertion cases is it necessary to view a wife somewhat critically. In all these cases, whatever be the cause of action, the standards of life of the parties, not those of the court, must be accepted as the standard. The Interim Order, to be dealt with later, often becomes a powerful lever to tide over a testing period and to pave the way for a lasting reunion.

WILFUL NEGLECT TO MAINTAIN

This summons can be applied for by a wife while she is still living with her husband. But when this is so the wife should be asked, both before the summons is issued and when it is about to be heard, whether she intends to leave her husband if she gets an order. She should be told that any order that may be made will have no effect unless the parties separate. Statute law expressly provides that no order, made on any ground, shall be enforceable whilst the parties are living together and that any order shall cease to have effect if for a period of three months after its making the wife continues to live with the husband. Wisely the law

refuses to divide up the family income while the parties are together. But many women come with such requests, so courts have to be on their guard.

Another vital point under this head is that the word "wilful" must always be respected. Especially in these days of widespread unemployment women come to the courts stressing their own shortage of money. This is an irrelevant factor, hard though it be to say so, unless the husbands have, or could have, money for them. The test is the pocket of the husband rather than the needs of the family. In many cases the court can do nothing more than refer the wife to the nearest Public Assistance Committee. But neglect to maintain may be wilful even if the husband has no money, if the court is satisfied that he could obtain money. "Won't work" is as bad a defence as "Won't pay." Should a husband have refused work, the court is in much the same position as a Court of Referees under the Unemployment Insurance Acts, and must examine into the suitability of the task refused.

If the parties have separated by agreement, whether in writing or not, the wife can still apply for an order for wilful neglect to maintain if the agreement has not been carried out or was unreasonable, or if the circumstances have materially altered since the agreement was made. Often the non-fulfilment of a separation agreement is the best evidence of wilful neglect, but it is always open to the husband to prove if he can that his means have been reduced since the agreement,

in which case, if an order is still justified, it should be for the amount he is able to pay at the time. In cases where the amount set out in the deed of separation has not been paid, but the court is satisfied that there has been no wilful default, the wife can sue for the arrears in the County Court, and it may be wise to tell her so. But though County Courts were intended to be summary courts for poor people, in fact they are not. Substantial fees have to be paid before cases are heard, and no one has, unfortunately, any power to remit them, however poor or deserving the plaintiff may be. It is sometimes as well to give a warning about this when Police Courts refer people to County Courts.

Wilful neglect to maintain is, like desertion, a continuing offence, so a wife may apply at any time, however long ago she and her husband parted. It is no rare event for a wife to maintain herself for many years after the separation, and then to apply, usually because of failing health, for maintenance from her husband. In such cases the husband often expresses great surprise and indignation, but once again it is necessary to remind him of his persisting obligations.

Most of the defences that are open to a husband in a summons for desertion are open to him on one for wilful neglect to maintain, so much of what has been written under that head applies. But the most usual defence is inability to pay.

PERSISTENT CRUELTY

This summons, like the last, may be applied for by a wife living with her husband, so the warnings already mentioned should be given when this is the case. The persistent cruelty may be to the wife herself or to her children.

When this summons is before a court the warning already given under the heading of desertion is specially relevant. Justices must decide these cases according to the standards of life of the parties, and must ignore the question of what their own reactions would be to similar conduct. For instance, with a couple of rough and primitive type blows between husband and wife mean far less than they would among those on a higher level of civilization. In all poor areas one sees cases where summonses have been dismissed, despite blows having been proved, where yet the parties have at once returned to live together in at least apparent amity. In criminal work we cannot imagine ourselves too much in the shoes of a defendant; this is almost an essential if justice is to be tempered with mercy and understanding. But in matrimonial work we must guard ourselves against judging others by our own standards; we should flatter ourselves that we would not be on the Bench if we were not just a little above the average of human kind.

A wife on a persistent cruelty summons need not

go so far as to convince the court that her safety is in danger. A single act of violence is not sufficient, and while there is a High Court case (Broad *v.* Broad, 1898)[9] that indicates that "a series of assaults" on a single day will suffice, this is not a reliable authority; it is inconsistent with the later case of Goodman *v.* Goodman in 1931.[10] There need not be any intention on the part of the husband to be cruel. The communication by a husband to his wife of venereal disease must have been wilful if it is to be held to be persistent cruelty, and since 1925 there have been special statutory provisions about this.

There are many High Court decisions on various aspects of cruelty. But in considering them three points have to be remembered. (1) Until 1923 it was necessary for a wife petitioning for divorce to allege in addition to adultery, cruelty or desertion. As a result there were many exaggerated or faked cases in the Divorce Court (as now there are on adultery only). Many of the courts' decisions, therefore, have to be interpreted as coming from a court on its guard against deception. (2) The Divorce Court has to consider cruelty, not persistent cruelty. (3) In the words of the editors of Browne and Latey on divorce law, "there has been so marked a development in the marital relations of husband and wife and in the rights of a wife since the Ecclesiastical Courts administered the matrimonial law [1857], and judges are so bound to exercise their judicial discretion with due

regard to the customs and manners of their own time that a blind adherence to the decisions of over a century ago, or even of a generation ago, is impossible."[11] This gradual change in the law, conformable with the change in public opinion, should always be borne in mind when High Court cases are looked to for guidance. A good example is the question of the necessity for physical violence. But before we turn to this question another point to be remembered in connection with High Court decisions should be mentioned. Human conduct does not easily fit into legal definitions, and on some important matters both Parliament and the judges have been particularly careful not to give definitions. This throws a great responsibility upon courts of first instance, for they have to assimilate the spirit of the law rather than to apply definitions. When Justices have to do this, they can find comfort in the fact that in a famous case of Russell *v.* Russell in 1897[12] the House of Lords itself gave nine opinions on the interpretation of the principles about cruelty, five on one side and four on the other. It seems clear, therefore, that the common sense of Justices is likely to be more valuable than any detailed knowledge they may acquire about judicial precedents.

In recent years mental cruelty has received more attention than in the earlier years of matrimonial jurisdiction by State courts. In the infancy of its matrimonial jurisdiction the High Court laid down

that the "general tests" on the issue of legal cruelty were "bodily injury, reasonable apprehension thereof, or injury to health" (Tomkins *v.* Tomkins, 1858).[13] In 1865 (Swatman *v.* Swatman)[14] it was held that "where the evidence of actual violence used by the husband towards his wife is not sufficient of itself . . . the court will take into consideration his general conduct towards her, and, if this is of a character tending to degrade the wife and subjecting her to a course of annoyance and indignity injurious to her health, will feel itself at liberty to pronounce the cruelty proved." But within two months of this latter decision the pendulum swung again in the other direction. In Cousen *v.* Cousen[15] it was ruled that "indifference, neglect, cessation of matrimonial intercourse, without personal violence or words of menace do not amount to legal cruelty." But the courts before long became progressive again. In Walmesley *v.* Walmesley (1893)[16] the court found cruelty proved where "there was no allegation by the wife that her husband had ever treated her with physical violence, nor even that quarrels or angry words had ever arisen between them. The cruelty alleged consisted solely of neglect, coldness, and insults, from which the petitioner's health had been affected to such an extent that it was said it would be dangerous for her to continue to live with" the husband. The facts narrated in the report of this case were certainly unusual, and these should be read before the case is followed. No

case shows better the danger of citing precedents in matters which do not readily lend themselves to precedent. Once again, therefore, all that can safely be said is that Justices have to note the general line taken by the High Court and apply their own common sense.

In Police Courts some caution is particularly necessary when wives complain of mental cruelty, for this is a phrase, like "suffering from nerves," that is easily assimilated by the neurasthenic, and often means little. On the other hand, always accepting the standards of life of the parties themselves, mental cruelty can involve something far worse than occasional blows. I have had several cases where a husband, living under the same roof as his wife, has refused to speak to her for months on end. In practice Police Courts should have little difficulty in deciding these questions, provided that they observe the general principles and avoid sentimentality.

The usual defence of the husband in these cases is a denial of the facts alleged. But when judging these cases it is well to be specially careful that, even when the husband admits violence, he shall have ample opportunity to explain what led up to his lapse. Wives are sometimes morally responsible for the bad treatment they receive, and it often happens that a husband needs coaxing before he will explain. Gallantry, even if lacking in the home, may easily

prevent a husband from doing justice to himself in court. Even if the explanation cannot amount to justification, it should none the less be given, for it often throws much light on the conduct of the complaining wife. Far too many wives succeed in an unjustified pose of injured innocence in court—and this is one of the reasons why all Police Courts, when doing matrimonial work, should have a married woman as member.

In cases of persistent cruelty, as in the issue of adultery already mentioned, it is usual for courts to require some corroborative evidence of the wife's story. There is no rigid law to this effect. But we have to remember that most of the worst acts of cruelty in married life are by their very nature committed when husband and wife are alone. While giving full weight, however, to this consideration, we cannot ignore the other fact that one of the results is that a husband is very much at mercy of a complaining wife (or vice versa). The law has wisely refrained from laying down absolute rules about the need for corroboration.[17] Provided that Justices bear in mind that there should be corroboration where it is possible, they can find that persistent cruelty is proved without it. It is useful to remember that corroboration can come from the lips of the husband. This was definitely accepted by the High Court in the case of Williams *v.* Williams (1928),[18] which, though rather unusual in its facts, is an authority

on this point. For this reason courts should rarely dismiss a wife's case, however weak it may appear, before the husband has been heard.

The question whether in these cases a Separation Order, or merely a Maintenance Order, should be made lost most of its importance when in 1923 desertion ceased to be one of the essential ingredients in a wife's divorce. It may be doubted if the addition of the words to the order "that the applicant be no longer bound to cohabit with her husband" makes any difference in the ordinary case, though legal subtleties may arise in the event of another child being born to the wife. In Sayers *v.* Sayers (1929)[19] the High Court definitely ruled that these words should not appear in the order when the ground is desertion. The usual course is to insert them only in an order for persistent cruelty where the wife appears to be in reasonable fear of her husband.

CUSTODY AND ACCESS

When a court makes a Separation or Maintenance Order, and the parties have children under sixteen, the legal custody of them has to be provided for. As already mentioned, the husband has by law the custody until a court otherwise orders. When an issue is raised about custody, the law now stands that "the welfare of the infant" is to be "the first and paramount consideration," and that "the claim

of the father, or any right at Common Law possessed by the father" shall not be considered stronger than the claim of the mother.[20]

In the big majority of cases custody is automatically given to the mother when an order is made. If the matter is contested, it is usually because the father asserts that his wife is unfit to have custody, in which case he usually wants the children placed in the charge of his mother; sometimes he wants them placed in a school or home, and offers to maintain them there. Under the Summary Jurisdiction (Married Women) Act, 1895, the court has no power to give the custody of the children to any third party. But under the Guardianship of Infants Acts, 1886 and 1925, this can be done. Strictly speaking, separate summonses are necessary for this, but in a proper case these could be served in court while the parties are still there. But it rarely happens that it is wise to dispose of a disputed case of custody without adjournment for inquiry by some outside investigator. The National Society for the Prevention of Cruelty to Children is often able to give valuable help here. The court's powers under the Guardianship Acts are to "make such order as it may think fit regarding the custody of such infant and the right of access thereto of either parent." This latter point also may involve full inquiries out of court, and sometimes it is necessary to make detailed orders as to place and time of access. Where courts have the

service of a Probation Officer for such matters, they are best left in his or her hands to begin with, the court only coming in if such efforts fail. The really difficult cases about custody are where a mother disclaims all desire for her children. Happily such cases are rare, but they happen. If no suitable third party is available so that an order can be made under the Guardianship Acts, then the only course, if the mother is as bad as she paints herself, is to award the custody to the father, which does not necessarily result in the children living with him.

Questions of custody can be decided while the parties are living together, but, as in the cases already dealt with, no such order is effective while mother and father continue to live together. There seems little advantage, therefore, in coming to the court at such an early stage, if custody is all that is in dispute.

The above general sketch of the law will suffice, it is hoped, to give Justices and others a picture of the legal position. But it cannot be over-emphasized that the application of the law, however correctly, is seldom enough. The law is a cold thing, and parties to marriage cases in Police Courts need human sympathies, intelligence, and tact at least as much as they need legal decisions. Under present conditions it may easily happen that by merely hearing the case according to law and by merely applying the law to a proved situation, the real truth will never reach

the court. The purely legal decision is usually easy, but courts do not perform their true duty when they act merely according to law.

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16. Walmesley *v.* Walmesley (1893), 69 L.T. 152.
17. See Forster *v.* Forster (1910), 54 Sol. J. 403.
18. Williams *v.* Williams (1928), 93 J.P. 32.
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20. Guardianship of Infants Act, 1925, section 1.

CHAPTER IV

THE HEARING

THE first essential to an improvement in the methods of hearing marriage cases in court is to realize that in court proceedings there are many conventions that are not imposed by law. In their place they are convenient and usually necessary, being the result of generations of experience. But out of their place, or applied unthinkingly to modern conditions which are different from those of olden days, they become a nuisance and hamper the work of the court.

One of these conventions is the use of the witness-box. The idea is almost universal that in all courts witnesses must give their evidence there. So in the civil work of a Police Court the complainant goes into the witness-box, like the witnesses for the prosecution in a criminal case, and the defendant stands uneasily in front of the dock. This procedure may be convenient in a motoring summons, but it is very awkward in a husband and wife case. When applied to such a case, it results in the husband-defendant having to change places with his wife when his turn comes to give evidence, and in the wife being placed somewhere near the police-box while her husband gives his evidence. This kind of military drill is not understood by the parties; it bewilders them and entirely spoils the

atmosphere which is required. It is bad psychology. All court formalities are bewildering to the uninitiated, especially in a Police Court where most people are fairly ignorant and inexperienced. If anyone doubts this, let him watch the average witness trying to take the oath. Ordinarily these people are able to read quite well, but in the witness-box most of them stumble badly over the words of the oath and probably few of them understand what they are swearing. By the time that a well-trained usher has extracted the proper words from them, plenty of them are in a state of dither.

Few of these formalities are required by law; most of them are under the sole control of the court. All that the law demands is that before evidence is given the witness shall take an oath, or affirm. Where this is done matters not at all. Courts can arrange such matters as seems best to them. If a Bench decided to sit in the dock and to place the defendant in the police-box, though the court might lose somewhat in dignity, no court of appeal could interfere. In husband-and-wife cases, courts are free to arrange these matters as seems most convenient. Most County Courts have two witness-boxes, one on each side of the Judge, the plaintiff going into one and the defendant into the other. This is the best arrangement for small civil work, but where Police Courts do not have these facilities, they should make the best substitute they can.

My practice in marriage cases, adopted after much experimenting, is to use the single witness-box only

for third parties. Husband and wife sit on chairs facing me at an angle, so that if they have lawyers to assist them they can turn easily both to the lawyers and to me. If the use of chairs is not practicable, then the parties can be given the use of the front bench ordinarily used by solicitors and both solicitors and counsel be accommodated in counsel's box. The main point is that the parties should not be marched about the court, and should give their evidence where they have been, or will be, throughout the proceedings. This puts them at their ease and that fact helps to elicit the truth, and, what is more important, the whole truth. At the beginning of the case the usher goes up to the wife-complainant, she stands up and takes the oath. She then sits down and tells her story—all our courts, including the High Court, suffer from the strange idea that evidence must be given standing. When the turn of the husband-defendant comes, the usher similarly goes up to him, he stands up to take the oath and then he tells his story, also sitting down and, as far as possible, at his ease. The whole object of court routine should surely be to get witnesses at their ease so that their memories may flow into words. Yet most of our customs have precisely the reverse effect, and this is serious when simple people are being dealt with.

These points are of far more importance than they may appear in cold print, for they affect the whole tone of a hearing. Where parties have no legal assistance, and in Police Courts the majority have not, they should

be allowed to tell their story in narrative form with the barest minimum of interruption. In marriage cases the defendant-husband often needs to be encouraged to speak; he may be outraged by some of the things that his wife has said and a feeling comes over him that nothing that he can say will be of any good. It is my frank opinion that a large number of Separation and Maintenance Orders could be avoided if husbands were encouraged more to justify or explain their conduct. Quite often they have substantial grievances against their wives, and under conventional court methods these grievances are not elicited. As the last chapter showed, these grievances often do not amount in law to justification, but none the less they should be aired, for they are vital in any out-of-court investigation into the possibility of reconciliation; often they show how important it is that there should be such an investigation. In addition the airing of such grievances sometimes has an effect on the amount of an order if one has to be made in the end. Every court should adopt a sympathetic attitude to a tongue-tied husband, for the fault may lie in the court and its procedure.

The use of a single witness-box by both husband and wife in turn creates practical difficulties, especially when either has no legal representative. Cross-examination is an art which uninitiated laymen cannot practise. If a defendant is not assisted by a lawyer, he nearly always brings out, when his turn comes

to give evidence, points which according to our rules should have been put to the complainant in cross-examination. So the defendant has to be turned out of the witness-box and the complainant recalled to deal with these fresh points; alternatively, question and answer have to be given somewhere at the back of the court where the complainant is. All this is highly inconvenient, and can easily be avoided if the parties remain in the same place throughout the proceedings; the court then turns from one to the other as may be required.

This question of cross-examination is of serious importance where parties appear without lawyers. The whole of our system of conducting a court is based upon cross-examination and where the rules can be played by experts, as they nearly always are in the higher courts, the system works well. That massive book, Taylor on the laws of evidence, says that cross-examination is "one of the most efficacious tests which the law has devised for the discovery of truth."[1] This is perfectly true. By cross-examination lying is often exposed and the truth placed in its proper perspective. By cross-examination also the court during a plaintiff's evidence learns the nature of the defence, and is thus able to know what points are in dispute. But all this assumes that cross-examination is conducted according to rule. We have to remember that those who write textbooks on the law, and those who lay down the law, derive their experience from the higher courts,

where counsel trained in the arts of cross-examination are present to conduct the proceedings; when a litigant in person appears in the higher courts, he or she is usually a person of considerable education and often has a solicitor at hand to guide. We who work in Police Courts live in a different world entirely. Most of the people before us are

> Not the great nor well bespoke,
> But the mere uncounted folk
> Of whose life and death is none
> Report or lamentation.[2]

Some forty years ago, Sir James Fitzjames Stephen, a High Court judge and a great master of the laws of evidence, protested against the practice of trying to make laymen cross-examine. A defendant, he said, "confused by the unfamiliar surroundings and by the legal rules which he does not understand, tries to question the adverse witness and muddles up the examination with what ought to be his speech for the defence and, not knowing how to cross-examine, is at last reduced to utter perplexity and thinks it respectful to be silent." This learned judge recorded that "this is a scene which most lawyers know by heart, but which I can never hear without pain."[3] Yet to-day our system is unaltered, and the snubbing of parties for their failure to cross-examine still continues. Our legal system has not yet made any difference between a case conducted by counsel and one conducted by uninitiated laymen. I dwelt on this matter at some

length in my book on law reform *In Quest of Justice* (1931).[4] In marriage cases in Police Courts the results of this system are particularly bad, and if a defendant is snubbed for not cross-examining properly, or even if he is put out of his stride by being told that he must not make statements in cross-examination, he is not getting a square deal.

Taylor's book on the laws of evidence tells us also that "the manner in which witnesses ought to be examined" is "chiefly in the discretion of the judge before whom the action is tried"[5] and refers to an old case, Bastin *v.* Carew, in 1824,[6] where Lord Chief Justice Abbott said that "in each particular case there must be some discretion in the presiding judge as to the mode in which the examination shall be conducted, in order best to answer the purposes of justice." This is a general principle which is applicable as much to a Police Court as to any other. A great deal to prevent the evil urged by Mr. Justice Stephen can be done by Police Courts. As soon as I realized how great an evil this is, I refused to allow the conventional question, "Do you wish to ask this witness (or your wife) any questions?" I used the form, "You can tell your own story in a minute. Do you want to ask this witness (or your wife) any questions now?" In ninety-nine cases out of a hundred the result was that the defendant was content to wait and then I assumed the burden of cross-examining everybody so far as it was necessary. There can be no doubt that this is fully within the

the law. The results were in every way beneficial, and I frequently adopt this practice even in criminal cases. In marriage cases the benefits are specially marked. If husbands do try to cross-examine their wives, their points are usually irrelevant, and often their only result is to raise the temperature of the proceedings, thus reducing the chances of an ultimate settlement.

Experience has taught me to go further where it is perfectly obvious that a husband does not want to cross-examine his wife (and vice versa) and is not able to do so. I then omit even the modified invitation, provided that I am satisfied that I am not depriving the defendant of any right that he wishes to exercise. In a desertion or wilful-neglect-to-maintain case, witnesses are seldom called. So where it is clear that even if invited to cross-examine his wife the husband will only begin to tell his story, I have him sworn at once and tell him that he can now say whatever he wishes. It would be straining the meaning of the decision in Bastin *v.* Carew to justify this practice on its account, but I am satisfied that the High Court would not allow an appeal on the mere ground that a party had not been invited to cross-examine, provided that (1) the court was satisfied that he could not do so, (2) he showed no desire to do so, and (3) the court assumed the burden of putting all relevant points made by one party to the opposite party and witnesses. If the legality of this practice were ever brought before

the High Court, though I should be very sorry for the parties who had to bear the expense of thus testing the law, the High Court would learn a great deal about the practical difficulties in Police Courts.

There is a useful, but not a complete, reference to these matters in the book *The Office of Magistrate*, edited by Mr. Frederick Mead, a metropolitan magistrate for a record number of years:

> "In the majority of summary trials, the defendant is undefended, so that the task of cross-examination devolves upon him personally. Unfortunately, in many cases, the court attempts to confine the cross-examination too rigidly to questions and answers. Often the defendant is not possessed of sufficient intelligence to understand what is meant by asking questions, and even if he should have a glimmering as to this, is quite incapable of conducting an effective cross-examination. What he usually does is to commence to make a statement. He should not be checked in this, but allowed to 'run on,' and so disclose the facts which constitute his defence, and the court, by putting questions to the witnesses based upon the defendant's statement, will thus be able to achieve on the defendant's behalf a successful cross-examination of the witness."[7]

These words are applied to both civil and criminal cases, but as regards the latter the matter is compli-

cated by the theory of our law that an accused is not called on to say anything until the prosecution has made out a case against him. This theory applies also (unfortunately) in civil cases, but it is of much less importance in husband and wife cases and in civil work generally. And Mr. Mead does not say whether the invitation to cross-examine has to be given.

Where there is either no cross-examination or a very indifferent cross-examination, the court must itself assume the burden, as Mr. Mead says, for it needs the two versions of every relevant issue. Some day I hope that this burden will be imposed by law on all courts where parties in person appear. The more enlightened procedure now in force in our Juvenile Courts has embodied this reform.

> "If in any case where the child or young person is not legally represented . . . the child or young person, instead of asking questions by way of cross-examination, makes assertions, the court shall then put to the witness such questions as it thinks necessary on behalf of the child or young person and may for this purpose question the child or young person in order to bring out or clear up any point arising out of any such assertions."[8]

In marriage cases all Police Courts should act in the spirit of this rule. Whether or not they go through the formality of inviting every defendant to cross-

examine, courts must decide for themselves. But they will find, as I have found, that when simple people are before them the constant reiteration of the invitation introduces an undesirable element of formalism and practically always has negative results. But whatever practice courts adopt, the great thing to avoid is the snubbing of the parties because they have not the ability of a Simon or Birkett.

Those whose lives are spent in expensively conducted courts may not realize the importance of these matters. But only by some such changes as are suggested above will Police Courts ever be able to be confident that their proceedings have elicited the full facts from simple people.

What has been written above is the product of my own experience, but it is significant that similar conclusions were arrived at, after a much longer experience, by His Honour Sir Edward Parry, who for over thirty years was a County Court judge in Manchester and London. In his book *My Own Way* he wrote:

> "The fact is that the poor cases, where the plaintiff and defendant appear in person, where neither has the least knowledge of law, evidence or procedure, and where the main object is to overwhelm his, or her, opponent with volleys of irrelevant statements, cannot be tried on the traditional lines of a High Court action conducted by counsel, with plenty of money at stake and

This may be an exaggeration and, having appeared before Sir Edward Parry, and having also done his work as deputy-judge, I am sure that it is. But underneath the exaggeration lies a mass of truth. Sometimes the lower courts pride themselves on copying the High Court and are very strict to allow nothing that would not be tolerated there. Such ambitions are misplaced, and in the Police Court especially we have to conduct our work, always observing strictly the fundamentals of justice, without too much attention to the formalities that seem natural in the High Court.

Sir Edward Parry went on to point a moral which applies to Police Courts even more than to County Courts: "But it would be far more satisfactory if the

affairs of smaller people were not litigated at all, or at all events not litigated until an effort had been made to bring the parties together and get them to agree to a compromise." Even with the law as it stands to-day much can be done in Police Courts in this direction.

It may well be doubted whether any court proceedings, however humanely and intelligently conducted, will elicit the full truth in a marriage case. This is why I believe that in a large proportion of cases the first hearing should be regarded as preliminary only. Of course, there are many cases where at a very early stage it is obvious that the cleavage between husband and wife has gone too far to render any reconciliation possible, or even desirable. With a couple married some twenty years and leading a cat and dog life, with only grown-up children, one wastes no time or effort. Separation on terms as equitable as the facts permit is the obvious course. But in all cases where the parties are young, or have young children, the best course is usually to adjourn them for a time after hearing both sides, an Interim Order being made where necessary. The invaluable powers we have under Section 6 of the Act of 1925 to make such an order for any period up to three months are not as fully used as they well might be. We can adjourn any "application for an order of maintenance" and can order that for up to three months the husband shall pay any amount not exceeding the amount that could be directed on a final order. These Interim Orders

are extremely valuable and enable us to achieve justice while the main issue remains in abeyance. Sometimes it is wise to make a deserting husband pay on an Interim Order more than the court would be likely to direct on a final order, just to bring home to him the responsibilities of his position before he finally contracts another alliance. Sometimes it is wise to ask the Clerk of the Court to record "without prejudice to final liability" on his notes, so that the whole issue may be left open at any final hearing. Interim Orders are often a valuable lever for the investigator who will tackle the case, especially when the parties have not long been married. Few busy courts can fail to be struck by the number of cases that arise where the parties have only been married a few months.

There being at present no restrictions on the Press, we must remember, as I have said, that a few sentences may be enough to produce that harmful gossip of family and neighbours that so often destroys all hope of reconciliation. Where the parties have seen no investigator, I often put a case back so that a Probation Officer may have a short preliminary talk with both sides, for even such a hurried talk sometimes reveals that a public hearing at the moment may do harm. If the Probation Officer reports in favour of delay, the court should be careful to satisfy itself that both parties do really agree to delay; it happens sometimes that a false sense of politeness to a Proba-

tion Officer makes them agree to delay when they really do not want to.

The next chapter will deal with the investigation and its importance. Where in the end final orders have to be made, the over-riding consideration is that the amount ordered to be paid shall reflect, not the court's moral judgment on the husband's conduct, but its estimate of his ability to pay. But different considerations apply when the wife's means, actual or potential, are being considered. Where she has dependent children, she should be treated as generously as the husband's means permit, even if she personally is considered to be undeserving. The amount can be allocated between wife and children. But where the wife has no dependent children the court should face the question whether she could earn her own living. This matter has been touched on in the previous chapter. Plenty of women come to court, even in the early days of marriage, complaining of this or that conduct of their husbands, and taking it for granted that they are entitled to pensions for life at his expense. Even if the husband has put himself in the wrong and refuses to put himself right, it by no means follows that he must keep his wife for life; an order for a nominal amount may sometimes be best. The High Court has approved the principle that courts must consider a wife's ability to earn. In the case of Jones *v.* Jones (1929[10] the facts were that the husband was earning £3 a week. The son was grown up. The

wife was living rent free as a caretaker, and also earned from 10s. to 15s. a week as a waitress. The magistrates had ordered that the husband should pay £1 a week, but Lord Merrivale reduced this to 10s. He said: "The conventional standard in the Divorce Court, derived from the old jurisdiction of the Ecclesiastical Courts, by which a wife is not likely to get more than a third of the joint income, is very difficult to apply to a man earning wages and a woman able to earn money. In the usual position of husband and wife in such cases the proportion would make the wife substantially better off than the husband, and in some cases, where a man's earnings were precarious, it might leave him with nothing." Courts are entitled to apply these principles where a wife could earn, even if she is not doing so at the moment; this is another use for the Interim Order, to provide for the time while the wife is looking for work. As a general rule where there are no dependent children, courts do wisely to adopt a severe standard—and sometimes to remind the wife of the homely maxim that it takes two to make a quarrel. Where wives find it easy to get orders from Police Courts, the social effect in the neighbourhood is generally bad.

A few minor points are worth mention. If the court orders the weekly amount to be paid through the court, it is always wise to instruct the husband how and with what words to cross a postal order. Far too many uncrossed postal orders are sent through the post,

and this creates temptation both for postal servants and for the servants of the court. If the order is made payable direct, a few words to both parties about keeping accounts in a penny book are a good investment, for failing such accounts it will be practically impossible for the court later to assess any arrears. Where the amount is made payable through the court, the husband should always be told that it is his duty to keep the court informed of the address where he is living and the order should provide for this.[11] Where the amounts are to be paid direct to the wife, the husband can be ordered to notify changes of address to her. Another useful practice is to tell both parties that at any time either may apply for a variation of the order if circumstances change. In some cases it is worth while to tell the parties that a Maintenance Order is not necessarily for life and that there will be no legal reason why at any time they should not by mutual consent tear it up and live together again.

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2. Kipling, *Rewards and Fairies*.
3. *Life of Sir James Fitzjames Stephen*, by Leslie Stephen (Smith Elder), p. 210.
4. *In Quest of Justice*, by Claud Mullins (John Murray), pp. 245–8.
5. *Taylor on Evidence*, vol. ii, p. 887.
6. Bastin *v.* Carew (1824), Ry and M. 127.
7. *The Office of Magistrate*, edited by F. Mead, p. 37.

8. Summary Jurisdiction (Children and Young Persons) Rules, 1933. Rule 9(2).
9. *My Own Way*, by His Honour Sir Edward Parry, pp. 203–4.
10. Jones *v.* Jones (1929), 94 J.P. 30.
11. Section 4 of Summary Jurisdiction (Separation and Maintenance) Act, 1925.

CHAPTER V

THE INVESTIGATION

SUFFICIENT has been written in previous chapters to indicate the necessity that a Police Court should have at hand for marriage cases someone who can help informally. As has been shown, this is often desirable at the application for a summons, but it is indispensable at the first hearing and during any adjournment. To quote a report on *The Child, the Family, and the Court*, published in 1929 by the United States Department of Labour (Children's Bureau): "The judge, or a Probation Officer designated by him, should examine all complaints, and after adequate investigation should determine whether formal court action is to be taken. It should be the duty of the court to bring about adjustment of cases without formal court action wherever possible. Social investigation should be made in every case, and should be set in motion at the moment of the court's earliest knowledge of the case."[1] This may be going a little too far, as investigation is not always practicable, and sometimes it is obvious that it would be fruitless. But the general principle is sound.

It is sometimes said that married people object to investigation. Thus a local newspaper which circulates in the district where I work asked this question in

an editorial article: "Is there not a danger that married couples will resent being treated as grown-up children who do not understand the meaning of marriage? . . . Injudicious efforts to force couples back into conditions which have become loathsome to them may result in tragedy." The answer to this is very simple. There should be no force at all; where there is any resentment, no pressure should be applied. The parties have their legal rights, and should not be kept from them. But such objections are theoretical, for it seldom happens that parties object in any way to friendly investigation.

Even where courts have for this work no Probation Officer or Court Missionary a great deal can be done, as has already been explained. An excellent example is the experience of the South-Western court in London. For some years (before I was appointed to the court) it happened that the court's man Probation Officer was not available for marriage cases. The late Mr. J. A. R. Cairns was one of the magistrates, and he felt acutely the need for informal help. Contact was established with the nearest vicar, and soon six of the local clergy had volunteered their services. It was arranged that one of them should be on duty each week, and all the more hopeful cases were invited (note the word) to see him. Both wife and husband were ordinarily seen in the clergyman's house, and the result was that comparatively few of the cases came into court for trial. In the nine months

before I was appointed to the court the clergy dealt with 284 cases. Probably many of these were comparatively trivial, and could not in any case have led to court proceedings, but none the less there was matrimonial trouble that needed wise handling. In 237 out of these 284 cases a settlement out of court was arranged, either by reconciliation or by agreements to separate. There was no question of religious proseletyzing; the clergy were content to regard this work as religious in the broadest sense of the word, to be in fact the Good Samaritan, and the result was that no difficulty was experienced when the parties were not members of the Church of England. This good work still continues, somewhat modified, as we now have different arrangements in regard to Probation Officers. With the warm support of the auxiliary Roman Catholic Bishop of the diocese, we now also have the service of two Roman Catholic priests in the district to help us in cases from that community.

In England the Bench has happily a great prestige, and this is precisely one of the directions in which this prestige can be turned to good account. People of all sorts are willing to help the Bench, and if a Bench does not receive all the help it needs, the explanation probably is that the Bench has not tried to get it.

As an indication of what can be done, some further experience at the South-Western court may be useful.

Having learned at the North London court the value of having doctors available to help certain types of marriage cases, I wanted to find a few doctors in the South-Western area. Through the good offices of the British Social Hygiene Council the local secretary of the British Medical Association was asked to help me. In response to an appeal by him no less than thirty-three medical men and women volunteered their help, far more than we could possibly make use of. It is true that at the London courts we have large Poor Box funds, subscribed by a generous and interested public, and that I frequently offer a small fee out of these funds to the doctors who help us in matrimonial disputes, in cases where the parties are poor. But I am convinced that such small fees as we pay played no part in inducing these doctors to offer their help.

The value of having medical help at hand for certain kinds of marriage cases cannot be exaggerated. The number of such cases is comparatively small, but when they arise nobody else but a doctor is likely to be able to help. Unfortunately where sexual relations have been the cause of the discord between husband and wife, it often happens that the trouble has gone too far before it came to light. But where young people are in trouble about sex—and we must remember that the average man and woman, even to-day, begin married life without any guidance on the subject at all[2]—the only hopeful course is to

persuade them to discuss their troubles with a doctor before they take any final action in court. Religious or moral appeal alone will do little good in such cases. Constructive re-education in decent sexual standards is what is needed, and it is not fitting that this should be undertaken by a layman. The doctors need to be selected, for unfortunately some of them, like some on the Bench, have inhibitions, and cannot help in cases of sexual difficulty.

As an illustration of what can be achieved when a court enlists medical aid the following case may be of interest:

> Husband and wife had six children, five at home; none dependent. Husband in regular work; usually gives wife £3 a week; wife pays rent. Wife works three days a week at 7s. 6d. a day.
>
> Wife told magistrate she has only had 5s. from husband in first three weeks. Husband comes home the worse for drink and then uses the most filthy language; abuses the children, and generally makes home unbearable; wife could put up with it no longer; she has been sleeping with children to get a little peace. Magistrate referred wife to Probation Officer for further investigation.
>
> Wife told Probation Officer that husband wants sexual intercourse at all times, even during

day; wants it by unnatural practices. This was reason why she stopped sleeping with him. As result he has threatened to bash her head in. Two days ago he came in worse for drink; abusive language, and tried to hit her. She locked herself in girls' bedroom. He was up and down stairs all night; hammering on door, etc. Yesterday he kissed the girls and asked that they might all be friends again. But later came down to kitchen with boot in his hand and threatened to bash wife's head in; restrained by others. Wife now leaving home to stay *pro tem.* with married daughter.

Summons issued for persistent cruelty, and Probation Officer wrote asking husband to see him.

Four days later.

Husband called. Admits drinking, but denies any intention to harm wife. Told of wife's statements about sexual practices; admits certain amount, but attributes it to drink. Is willing to see doctor suggested by Probation Officer. Wife asked to call again.

Next day.

Wife called. Probation Officer asks if she would consider returning to husband if things can be improved. She is willing to see same doctor.

Appointments made for both with Dr. X.

Six days later.

Wife called. Has seen Dr. X. Is returning to husband to-night. Thinks that now husband understands certain things he will be all right. Asked if she wanted summons to remain on court's list, said she would rather withdraw it.

Probation Officer told her she could always come back if more trouble, and magistrate would doubtless issue summons again.

Wife did not return.

Several points are worth accentuating in this case. To the magistrate no word was said about sexual troubles, and he probably regarded the case as an ordinary one of drink and temper. The Probation Officer (having had much experience with the magistrate in the past) finds out the truth underlying the superficial troubles. The facts being as they were, no mere moralizing about temperance and temper would have been likely to achieve much result. Both parties accepted at once the suggestion that they should discuss the situation with a doctor. Neither court nor Probation Officer knows what the doctor said, as we are always most careful to respect the confidence between doctor and patient. A hearing in open court would in this case probably have driven the parties further apart, and removed all possibility of the wife returning home. The magistrate never saw the husband, but was consulted informally by the Probation

Officer before the case was referred to the doctor. Had the doctor's efforts failed, the magistrate would have done his best in court to induce both parties to speak about their sexual troubles, but he might well have failed, and thus have had to decide the case on the evidence as to drunkenness and blows, or wilful neglect to maintain.

In my four years' work in Police Courts I have never found any difficulty in inducing parties to suspend their legal hostilities while they see a social, religious, or medical investigator, and I am, I hope, not so foolish as to offer investigation to an obviously hopeless case. The only practical difficulty arises when either of the parties appears with solicitor or counsel. Then it is more difficult to suggest delay for inquiry, but it can still be done with a little tact. Local solicitors, who get to know and I hope trust the court, are easier to handle in this respect than counsel, who are usually strange to the court. Barristers are trained to litigation rather than to social investigation, but they seldom resent an appeal from the Bench that they should temporarily drop out of the case so that someone may try his hand at reconciliation. So long as solicitor or counsel are in charge of a case it would be improper to delay it for investigation without their consent.

The only serious difficulty arising out of the investigation of marriage cases is the problem how the investigator is to inform the court of facts which

he learns, and which in his opinion the court should know before any final order is made. This difficulty is a very real one, and in many cases cannot be got over with the law as it stands. It would be wrong for the investigator to feel under any obligation to report all that he or she learns. Such an obligation would defeat the whole object of the investigation, and would destroy its atmosphere. Yet it frequently happens that the investigator feels that certain facts or allegations should be in the possession of the court. But the laws of evidence bar the way. In a decision of the High Court in 1929 (Pearce *v.* Pearce)[3] the intervention of a Probation Officer at the final hearing in court was approved, and this ruling would apply to any investigator. But this case, like so many others, needs to be closely examined before it is relied on. All that the Probation Officer did in that case (and all, therefore, that the court approved) was to state in open court the result of his efforts at reconciliation and "his favourable view of the husband's character." But it is often very undesirable in the interests of the parties and of their children that the investigator should convey his information in open court; sometimes it may be difficult or impossible for the investigator to attend the court. On the other hand, the parties are entitled to know of any allegations made to the court which concern them and to answer them if they wish. This problem cannot be adequately solved within the existing law.

If both parties consent, there is no reason why the investigator should not report to the court in writing, but care must be exercised to see that such consent is freely given. The position is a dangerous one, as the investigator is naturally a person of some authority. Some courts allow a Probation Officer, apart from the consent of the parties, to inform them privately of his impressions. This is an undesirable, as well as an illegal, practice. Some courts allow the investigator to report in writing, but without the free consent of the parties this is also illegal. If any information reaches a court which has not been given in open court according to the laws of evidence, it is essential that, if it is to be in any way used by the court, it is put to the party affected at the hearing. Here a professional magistrate has an advantage over his lay colleagues, for his training and experience at the Bar have equipped him with a greater power to disregard anything learned by him that has not been made evidence. Lay Benches should be very careful about stretching the laws of evidence, but at times it has to be done. The fact stares both professional and lay magistrates in the face that often an informal investigation reveals a situation that is substantially different from that disclosed in court according to the laws of evidence. It must surely be the frequent experience of all of us that in court we are obviously being given one part only, often the least important part, of the real truth. But until the law is changed there is no satisfactory way out of this impasse.

Before long I believe that the law will allow greater flexibility in this respect. A useful precedent is to be found in the Rules that govern the procedure of Juvenile Courts. There "the court shall take into consideration any report which may be furnished by a Probation Officer. . . ." and "any written report of a Probation Officer . . . may be received and considered by the court without being read aloud." But then "the child or young person" and "the parent or guardian, if present," shall "be told the substance of any part of the report bearing on his character or conduct which the court considers to be material," and "if the child or young person, or his parent or guardian . . . desires to produce evidence"[4] about such material statements, this is permitted. It is true that this procedure only applies in Juvenile Courts after guilt is proved or admitted, and old-fashioned lawyers will jump at this distinction. I can see, however, no reason why this practice should not be made legal for marriage cases; there is no reason why the principles of criminal trial should be applied to them in their full rigour. I am convinced that reform will come somewhat on these lines. But until it comes, Justices must go warily, however sincerely they may desire to circumvent our present inelastic laws of evidence.

It was said in Chapter I that under present conditions courts do their best work when a case is settled out of court. But even that satisfactory result should not

always be the end. A "follow up" after a reconciliation is often desirable. At the South-Western Court when a case is reconciled we have recently introduced a system whereunder the Probation Officer, if the parties are willing (as they usually are), sends a letter to a local clergyman agreed to or selected by the parties. This letter is accompanied by a short note explaining the case and states that if the clergyman will call upon the parties his visit would be welcomed by them and appreciated by the court. It is too early yet to write of results of this "follow up," but we have reason to believe that many reconciled couples will appreciate it, that it will be helpful to them, and that the clergy will find it a valuable opportunity.

Of course no attempt at "follow up" will be made unless the parties desire it. The National Association of Probation Officers has suggested compulsion on the lines of s. 62 of the Children's Act, 1933, but this, in my opinion, would fail.

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2. In this connection a booklet published in 1934 by the Student Christian Movement Press may be found useful: *Right Marriage*, by Canon F. R. Barry, Claud Mullins, and Dr. Douglas White. See also *Marriage, Children and God*, by Claud Mullins.
3. Pearce *v.* Pearce (1929), 93 J.P. 64.
4. Summary Jurisdiction (Children and Young Persons) Rules, 1933. Rule 11.

CHAPTER VI

OTHER MATTERS

VARIATION OF THE ORDER

STATUTE law provides that at any time either party may apply to have the terms of a Separation or Maintenance order varied if there is "fresh evidence to the satisfaction of the court."[1] According to strict law this "fresh evidence" must be evidence which could not reasonably have been made available at the time when the order was made. Thus the husband's means may have been reduced or increased since the order, the wife may have obtained work or lost her work, she may have given birth to another child by her husband, and so on. But Justices do well to give a generous interpretation to these words "fresh evidence," and to do all that is possible to see that consideration of the present situation is not obstructed by technical points. The Home Office Departmental Committee on Imprisonment in Default of Payment of Fines, etc., reported in June 1934 in favour of the abolition of this necessity for "fresh evidence," wisely pointing out that "many of the parties in matrimonial cases before Justices are not legally represented, and are not of sufficient education or ability to put their case before the court in a proper manner, or to give all the information which may

be available to them."[2] Until the recommendations of this Committee are enacted by Parliament Justices should go as far as they can to carry out this proposal, remembering that a party objecting to the hearing of facts on technical grounds often has a weak case. The barest scintilla of "fresh evidence" should, therefore, be accepted.

At present application to vary an order can only be made to the court which made the order. This requirement of the law creates many practical difficulties, and here too a change in the law has been recommended by the Departmental Committee.[3] The order may have been made in Newcastle, and have been transferred to a London court, where the wife is living, yet only the Newcastle court can vary its terms. At present there is no satisfactory way out of this difficulty, and that fact constantly causes hardship. Justices under such circumstances can only "muddle through" as best they can.

Where courts are enforcing their own orders and the parties are living in its district, it is sometimes wise, when the husband applies to reduce the order on account of unemployment, to refrain from doing so, but to ask the clerk to record that the application has been made, and that during genuine unemployment the court will not expect the man to pay either anything or more than the amount of the dependents' benefit at the Employment Exchange. This course has the advantage that the man has later to satisfy

WIFE *v.* HUSBAND IN THE COURTS
ADDENDUM

The Money Payments (Justices Procedure) Act, 1935, was passed by Parliament after this book was published and carries out some of the recommendations of the Home Office Committee referred to on page 111. It is one of the most important Acts relating to Police Court work passed in recent years and every court should take the fullest advantage of it. Several branches of Police Court work are vitally affected by the Act, but here it is only necessary to refer to it in so far as it affects wife *v.* husband cases. The following passages in this book are now in need of amendment and unfortunately the other difficulties referred to in chapter VI still remain.

Pages 121/2.

When applications are made in respect of arrears on separation or maintenance orders courts are now obliged to "make inquiry in the defendant's presence as to whether his failure to pay . . . was due either to his wilful refusal or to his culpable neglect." (s. 8(1)a). A HUSBAND CAN NOW BE SENT TO PRISON ON ACCOUNT OF ARREARS ONLY IF THE COURT DECIDES AFTER SUCH EXAMINATION THAT HIS DEFAULT WAS "DUE EITHER TO HIS WILFUL REFUSAL OR TO HIS CULPABLE NEGLECT." (s. 8(1)b).

Pages 115 and 118/9.

Courts can now remit the whole or part of the arrears without the wife's consent and without using the undignified procedure of ordering the imprisonment of the defaulting husband for one day. This may be done on any "application for the enforcement, variation, revocation, discharge or revival" of an order. (s. 8(2).)

Pages 111/2 and 114.

"Fresh evidence" is no longer required before a summons is granted to increase or diminish the amount of an order. (s. 9.)

Page 118.

A "statement in writing to the effect that wages of any amount have been paid to a person during any period, purporting to be signed by or on behalf of his employer," is now *prima facie* evidence of the facts stated in such statement. (s. 12).

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the court that he was genuinely out of work during the whole time that he did not pay the order; it happens only too often, when an order is reduced on account of unemployment, that the man continues to pay the reduced amount long after he gets back to work. When the "dole" was increased there was no automatic increase in the amount that its recipients were ordered to pay on maintenance orders. Until the wife applies to have the order varied again, the reduced order stands, but frequently the wife does not hear for a long time that her husband is employed again. One day, I hope, courts will have power to reduce orders for a stated time only. On the other hand, this procedure gives rise to difficulties if the wife moves to another area and wants her order transferred, for after transfer the court has no power to see that the arrears that have accumulated during genuine unemployment are wiped out. All that the court can then do is either to issue a formal arrears summons before the order is transferred, and itself on that summons wipe out the arrears, or, if there is no time for that, to inform the court to which the order is transferred that it is undesirable to enforce the arrears. Until we are given new laws these practical difficulties cannot be avoided.

DISCHARGE OF ORDER

The same applies to an application to discharge the order; it can only be done by the court that made

the order. There is also the same necessity for "fresh evidence," but here few difficulties arise as the facts to be submitted are usually fresh.

An order must be discharged if it is proved that the wife has voluntarily resumed cohabitation with her husband. But Justices have a discretion to exercise here. It sometimes happens that a husband after an order has been made returns to his wife for a casual visit, his wife rather tolerating than accepting the return. This does not necessarily amount to a voluntary resumption of cohabitation, especially if the husband was in fact trying to trick his wife into a situation that would put an end to the order. The court has to inquire fully into the whole circumstances and to test the motives of both parties. The court is also entitled to have regard to the possibility that, even if the present order should have to be discharged, the circumstances may be such that a fresh order would at once have to be made.

A more frequent ground for asking for the discharge of an order is that the wife has committed adultery. Here a similar law applies as in a defence by the husband to the making of an order, dealt with in Chapter IV. The court may refuse to discharge the order if it is of opinion that the wife's adultery "was conduced to by the failure of the husband to make such payments as in the opinion of the court he was able to make under the order."[4] Many ugly situations have to be investigated when such alle-

gations are made, and it is necessary to inquire very carefully into the conduct of both the parties. Mere non-payment of the order by the husband cannot be accepted as an answer to the wife's adultery, for there must have been non-payment of sums which the court is satisfied that the husband could have paid; the Act is explicit on the point. An important detail in this connection is that an order is in force until it is discharged, and that, therefore, arrears up to the time of discharge can be enforced. Whether courts should enforce such arrears or not must depend upon the individual circumstances. Sometimes it is wise to give the wife her pound of flesh, but more often it is best to wipe out the arrears in effect by the clumsy and undignified method (to be discussed later) of awarding the husband one day's imprisonment, which need not be enforced.

When orders have to be discharged on the ground of the wife's adultery two courses are open to the court if the parties have dependent children. On the one hand summonses can be issued under the Guardianship of Infants Acts; this has the advantage of throwing open the possibility of awarding custody of the children to a third party, a step that may be desirable if the wife is a bad case of adultery and the husband a bad case of cruelty or desertion. But at present this procedure has the very real drawback that when orders are made under these Acts, the wife or other guardian can only place the father in peril

of imprisonment for not paying if full proof can be offered that he is able to pay. This thorny question will be discussed in the next section. The other course is that provided by the Act of 1925; the court can at once make "a new order that the legal custody of the children of the marriage shall continue to be committed to the wife, and that the husband shall pay to the wife . . . a weekly sum not exceeding ten shillings for the maintenance of each such child until the child attains the age of sixteen years."[5] Unless the wife is obviously an unfit person to have custody of the children, this is usually the wisest course, and often it happens that it is desirable to make the total of the payments by the husband nearly as much as he had to pay on the old order, provided, of course, that not more than the legal maximum for any one child is ordered. On these points the welfare of the children is the principal consideration.

ARREARS

The law on this subject is in a very unsatisfactory condition. The Departmental Committee already mentioned have condemned it, but until Parliament changes the law no conscientious Police Court can administer it with any satisfaction to itself. Even so, there are bad and less bad ways of administering it.

The most important point to realize is that courts are not bound to enforce arrears. The idea exists in some places that when arrears have reached a certain

amount, courts have no alternative but to order the imprisonment of the defaulter. This is utterly wrong. Even with our present law there is nothing to prevent courts from making it a general rule that they will only order husbands to prison if they are convinced that their failure to pay has been wilful. Indeed, every court should act on this principle. The following figures given in the report of the Departmental Committee show a probability that husbands have been extensively ordered to prison for mere poverty: in 1915 (when trade was good and the unemployment percentage* was 1·1) 1,119 husbands were committed to prison; in 1918 (when the unemployment percentage was 0·8) the committals were 772; in 1923 (when the unemployment percentage was 11·7) the number was 3,998, and in 1931 (unemployment 21·3) it was 4,089.[6] These figures are not creditable, and while we must await legislative changes for complete reform, we can do much to reduce these numbers within the present law. On the other hand, we must not fall into the danger on the opposite side; if we are unduly weak, plenty of husbands will refuse to pay, and women and children will be the sufferers.

When endeavouring to assess the means of the husband, courts cannot hope, if they are going to do their task properly, to conform fully to our strict

* The unemployment figures given here are not given in the Report and have been taken from the address given before the Magistrates' Association in 1932 by Miss Margery Fry, J.P.

laws of evidence. It is usually impossible either for the wife to prove strictly what the husband is earning, or for the husband to give formal proof. Here Police Courts do well to accept any information that appears to be genuine, despite the law against "hearsay" evidence. Letters from employers, for instance, setting out actual wages earned should be freely accepted for what they purport to be. Similarly, statements by Probation Officers or Public Assistance officials as to the results of their inquiries from Employment Exchanges, etc., should be admitted, and are often most helpful. Justice demands that the maximum information should be available about the economic position of the parties, especially if there is any question of committal to prison for non-payment, and inelastic laws of evidence should not be allowed to be a barrier.

As stated above, courts have no power to reduce arrears. But often this can be done by consent. When, for instance, a wife has allowed arrears to accumulate for some time without taking action, and I am satisfied that the husband could have paid, but am equally convinced that he can never pay off the full amount of the arrears, then I say to the wife, "I am ready to make an order and to send your husband to prison if he does not pay it, but he can't pay £*x*. Will you trust me to make the order for a sum that I think he can pay?" The wife usually agrees, and I make an order for £*y*, backed by a committal order; but it

is often wise to suspend the committal for a week or fortnight to give the defaulter time to find the money. We have always to remember that though a distressed wife may at the moment be glad to see her husband ordered to prison, she will get no money while he is there—and perhaps none after, if going to prison loses him his job. Should the wife not agree, the court still has open to it the procedure of in effect cancelling the arrears by ordering imprisonment for one day. The High Court in the case of Grocock *v.* Grocock (1920)[7] laid down that while the court has a discretion as to making an order, it can only make an order for the full amount. That is true, but our law does not specify any minimum term of imprisonment. The suggestions just made are legal ways of getting round this decision where justice requires it.

An order of imprisonment for one day has the effect of wiping out the debt. In proper cases, even the one day need not be enforced, and in fact I usually instruct the gaoler not to enforce it. If enforced, it means that the man is held in custody in the court building until the end of the court day. It is regrettable that we have to resort to these tricks to ensure justice, but until we are given power to reduce arrears, we must choose the lesser evil to avoid the greater.

Serious practical difficulties arise when defaulting husbands are known to be far away from the area of the court. Here, also, the Departmental Committee have valuable suggestions to offer.[8] At present the

best course is for the court to have a letter written to him (assuming that his address is available, which is not always the case) asking for a full explanation. Probation Officers can often be of great assistance in communicating with their colleagues in the district where the husband is living so as to check the man's statements. Sometimes the police are able to obtain information. Where these measures fail, courts have to face the possibility of issuing a warrant for the man's arrest. For two reasons courts should hesitate before doing this. Such a warrant puts the police to a great deal of trouble and expense; the man may have to be fetched from hundreds of miles away. Secondly, when he finally appears before the court, what is the court to do with him? He may well be unemployed, possibly destitute. The court has no means of checking what he says about himself, and to remand him for inquiries is difficult if he has no money. If non-payment has been caused by genuine poverty, prison is not the place for him, even on remand. The local Public Assistance authorities will not bless the court for dumping a stranger upon them. From these difficulties there is no suitable way out. One consideration that may save the situation in some cases, but only where there is no destitution, is that there is no reason why the warrant should not be backed for bail. This saves much expense to the police, and, if the man is in a job, it may also save him the job.

When Police Courts are considering the amount

they shall direct on an original order, they are obliged by law to consider "the means both of the husband and wife."[9] This is common sense, as well as law. Unfortunately, however, the law does not impose a similar duty when husbands are brought before the court on summonses for arrears. This legal lapse has been made worse by a High Court decision which, harmless and indeed useful in itself, has been most unskilfully reported. This is a quotation from Stone's *Justices' Manual*: "Evidence of means is not required to give justices jurisdiction to make an order of committal (R. *v.* Richardson, 1909)."[10] No wonder that in some courts it is thought that committal orders must be made if arrears are high. This case must be read if it is to be understood. It did decide the point mentioned in Stone. But Lord Alverstone, Lord Chief Justice, also said this: "In my opinion justices have jurisdiction to commit him even though he has no means to pay. They would, in practice, however, issue the warrant only if they thought that under the circumstances the man's omission to make the payments was deserving of punishment." And Mr. Justice (Lord) Darling said, "I think they [the justices] may be trusted not to exercise their jurisdiction oppressively." There could scarcely be a worse illustration of the drawbacks of our system of uncontrolled judge-made law. Since 1909 Police Courts have been taught that the High Court does not require them to examine a husband's means on an arrears summons before ordering him to prison.

The very contrary was the impression that the judges intended to create; yet the report in Stone cannot be called inaccurate; it is merely incomplete. So is the headnote in the Law Reports.

All these matters are likely to receive the attention of Parliament in course of time. Till that happens Justices should act upon the spirit of justice, and that spirit demands that a man be not sent to prison for not paying money unless his default has been wilful. To accept that standard in no way conflicts with the letter of the law, but reliance on the mere letter of the law, as it stands at present, will inevitably result in many men being sent to prison who do not deserve to go there. At the same time the warning must be repeated. If we are soft-hearted and fail to make adequate use of our power to send defaulters to prison, the orders that we make will in effect be waste paper.

REFERENCES

1. Summary Jurisdiction (Married Women) Act, 1895, section 7.
2. Command Paper No. 4649 of 1934, p. 46.
3. Ibid., p. 52.
4. Summary Jurisdiction (Separation and Maintenance) Act, 1925, section 2(1)*a*.
5. Ibid., section 2(1)*b*.
6. Report, p. 95.
7. Grocock *v.* Grocock (1920), 1 K.B. 1.
8. Report, pp. 50–3.
9. Summary Jurisdiction (Married Women) Act, 1895, section 5(*c*).
10. R. *v.* Richardson (1909), 2 K.B. 851 at pp. 857 and 858.

CHAPTER VII

WHAT OTHERS HAVE SAID

IN the various debates in the House of Lords, when proposals to reform the procedure in Police Courts in marriage cases have been debated in the House, so many strong and valuable opinions in favour of many of the matters urged in this book have been expressed by leaders of public opinion that a selection of these will be a fitting ending to this book.

ARCHBISHOP OF CANTERBURY, May 15, 1934.

"I think it is right that cases of this kind—that is to say, applications for maintenance or separation orders . . .—should be held at sessions of the court, or at times, apart from the hearing of ordinary criminal cases.

"I also think it would be of great value in cases of this kind that where it was at all possible there should at least be one woman associated with the magistrate in the hearing of the case.

"I wonder whether it is not possible to make provision that, while the court must be open and in a sense public, the general public should be excluded.

"It should be the duty of the court, before hearing any application in any of these cases, to instruct the Probation Officer of the court to make full investigation into all the causes which lie behind the application."

LORD SANKEY, THE LORD CHANCELLOR, May 15, 1934.

"Particularly is the principle of conciliation desirable when the dispute is one which arises between husband and

wife and concerns those domestic relationships which everybody in the country desires to see happy and undisturbed.

"To have a gaping gallery listening to some unfortunate woman giving a most intimate account of a dispute between herself and her husband is disastrous in the last degree.

"With regard to some of the ideas of the noble Lord [Listowel], they can, and it is to be hoped will, be accomplished by the magistrates themselves, by assigning particular days and particular hours for the hearing of such cases."

LORD MERRIVALE, July 25, 1934.

"The present state of things is very unsatisfactory. It is not an advantageous thing that if a man and his wife fall out . . . there is then the possibility of the lower class of journalists . . . exploiting their differences and increasing them."

LORD MERRIVALE, November 7, 1934.

"I do not think there is anybody at the present time who is acquainted with the operation of our existing methods who does not think that they could be greatly improved to public advantage.

"Married people do quarrel violently, and one of them, more often than not the wife, issues a summons and it comes before a court of summary jurisdiction, not selected for the purpose, very likely having no woman upon it, and it is fought out. Something like a dog-fight goes on. There is a public encounter of these married people, and if there was a possibility of their coming together before, it really becomes almost an impossibility in the great majority of cases after there has been that set battle fought out to a finish. That, to my mind, is a mistake.

"One of the elements which make these things very often absolutely fatal where perhaps they would not otherwise be is the unbounded publicity. . . . It does not do any good."

ARCHBISHOP OF CANTERBURY, November 7, 1934.

"There are hundreds of cases where applications for separation orders would never have been made, and separation orders would never have been granted, if there had been the opportunity for the timely intervention of some wise and kindly friend of the parties; and that infinite mischief to the children and to the homes would have been saved if there had been that intervention."

LORD MERRIVALE, January 29, 1935.

"It affects particularly the less well-to-do classes in the country, and the law and the procedure which govern it, and have governed it since about the year 1837, are in a condition in which, in the very generally held opinion of those who are familiar with the subject, substantial change is overdue."

ARCHBISHOP OF CANTERBURY, January 29, 1935.

"I do not think that the interests of justice are advanced, or that the interests of the public are served, if parties are obliged to detail the most intimate matters of domestic and matrimonial life before a crowd which happens to be collected in court."

THE EARL OF FEVERSHAM (Spokesman for the Government), January 29, 1935.

"When all practical improvement in these informal methods has been effected, it will still, I think, be of vital importance to improve the court procedure for the purpose of dealing with that residue of cases in which extra-judicial methods have been tried and failed."

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